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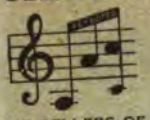
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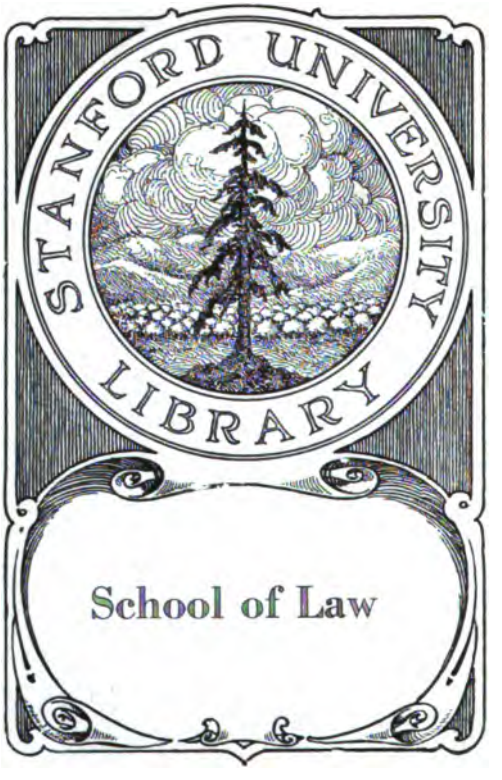
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HANDBOOK

OF

JURISDICTION AND PROCEDURE IN UNITED STATES COURTS

By ROBERT M. HUGHES, M. A.
OF THE NORFOLK (VA.) BAR
AUTHOR OF HANDBOOK OF ADMIRALTY LAW

SECOND EDITION

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In Memoriam
ROBERT W. HUGHES, LL. D.
U. S. District Judge
1874–1898.

PREFACE TO THE SECOND EDITION

THIS treatise is designed to fulfill the usual functions of the Hornbooks on the subject of which it treats. It does not purport to be an exhaustive or elaborate discussion, as such a plan would involve several volumes, instead of one. It is, however, intended to be a means of ready reference to the law on those questions of ordinary routine which the author's experience as a specialist in federal practice has taught him most frequently arise. It is believed that the need exists for a work of this character, notwithstanding the several excellent text-books covering the general subject which go into much greater detail. The work is designed, also, for use in law schools, where the need of such a treatise seems to be specially apparent.

It has seemed to the author much better and simpler in the discussion of the subject to commence with the inferior courts and follow up through the courts of last resort, though that is not the usual scheme adopted by other text-books on the subject. While this plan involves some duplication and cross-referencing, its advantage in enabling the student to trace a case from its inception to its final conclusion is so great as to have convinced the author that it is the best method of treating the subject.

In order to facilitate the use of the book as a court vade mecum, many statutes have been quoted verbatim; and the Supreme Court Rules, the Equity Rules and the Judicial Code have been inserted as an appendix. The index under these respective heads refers to those so quoted.

In the discussion of so much detail, mistakes are inevitable, and, although the author has endeavored to exercise the utmost care, he cannot hope to have escaped them. He begs the indulgence of the bar if any such have occurred.

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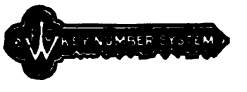
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A HANDBOOK
OF
FEDERAL JURISDICTION AND PROCEDURE

SECOND EDITION

INTRODUCTION

WHAT IT COMPREHENDS

The subject of federal jurisdiction and procedure includes the body of laws administered in the federal courts, and the organization and powers of the different courts charged with the duty of administering those laws.

The federal government being one of delegated powers only, the questions coming before the federal courts for discussion and decision necessarily are only those which the federal Constitution, or the acts of Congress passed in pursuance thereof, have intrusted to those courts.

The subject logically resolves itself into the following general analysis, which will be followed in this work:

A. The law administered and its origin:
- (1) Solely statutory.
- (2) Composed of
 - (a) Federal statutes;
 - (b) State laws.

B. The courts administering the federal law:
(1) The courts of original jurisdiction:
(a) The District Court.
(b) The Supreme Court.
(c) Various minor courts, including:
(1) The Court of Claims.
(2) The Court of Customs Appeals.
(3) The Commerce Court.
(4) The courts of the dependencies.
(2) The courts of appellate jurisdiction:
(a) The Circuit Court of Appeals.
(b) The Supreme Court.

CHAPTER I

OF THE SOURCE OF FEDERAL JURISDICTION AND THE LAW ADMINISTERED BY FEDERAL COURTS

1. The Source of the Jurisdiction.
2. Derivation of Powers of Federal Courts.
3. No Federal Common Law.
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5. Same—Law of Local State When No Written Federal Law Applicable.
6. Same—Statutes of Local State.
7. Same—Unwritten Law of Local State.
8. Same—Construction of State Statute.
9. State Law of Title to Real Property.
10. Contract or Personal Relations.
11. Not Bound by State Law in Questions of General or Commercial Character.

THE SOURCE OF THE JURISDICTION

1. The jurisdiction administered by the federal courts arises exclusively from the federal Constitution and the laws and treaties made under its authority.

Our dual system of government renders us subject to the constitution and laws of our state in most matters of local concern, and to the federal Constitution in national and international matters. This latter Constitution, becoming effective thirteen years after the independence of the original states, and only adopted after great opposition, is a constitution of limited scope; containing simply the powers therein expressly granted, and leaving with the states all powers not enumerated and too vast to be numerable.

In the conflict along the necessarily uncertain border land between those federal powers expressly granted and those cautiously and jealously withheld, it required little

prescience to realize that a system of national courts was necessary to protect the new government in retaining and defending the privileges and duties imposed upon it by this new and untried document. The experience of the states under the Articles of Confederation had taught this beyond peradventure. And our history since the adoption of the Constitution has shown that if state courts alone had been intrusted with the duty of construing the Constitution, especially in those doubtful and difficult questions as to the relative powers of the states and the nation, it would have been rendered impotent to accomplish the objects for which it was designed. The national courts and the long line of great jurists who have sat in them have saved it from this fate, and given it vigor and vitality. If, as some say, they have made of it an instrument which its original draftsman never designed and of which they never dreamed, it is fair to say in their vindication that they have made of us a nation of which our fathers never dreamed.

The judicial power of the United States courts, as a whole, is conferred by article 3, § 2, par. 1, of the Constitution, which provides: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

It will appear, when we come to consider the distribution of this general mass among the different federal

courts, that Congress has not exhausted the powers conferred upon it by this section, and that it has left many controversies to the state courts which it could have bestowed upon the federal courts.

DERIVATION OF POWERS OF FEDERAL COURTS

2. The federal courts are courts of limited jurisdiction, and derive their powers solely from statute.

Except as to the subjects intrusted to the Supreme Court by paragraph 2 of this same section, an act of Congress is necessary before the courts can take cognizance of any of the cases above named.[1]

As the national government is a government of delegated powers only, its courts are courts of special jurisdiction only, and hence the party applying to them for relief must first satisfy them that they have the right to give it.[2] This must be shown by reference to some statute giving the right to the relief sought, for the United States, as a nation, have no common law.

NO FEDERAL COMMON LAW

3. There is no general common law of the United States as a nation, and hence the common-law rights administered by the federal courts arise incidentally in exercising some statutory jurisdiction conferred upon them.

[1] U. S. v. Hudson, 7 Cranch, 32, 3 L. Ed. 259; In re Wisner, 203 U. S. 455, 27 Sup. Ct. 150, 51 L. Ed. 264; Columbus Iron & Steel Co. v. Kanawha & M. R. Co. (C. C.) 171 Fed. 713. *See "Courts," Dec. Dig. (Key-No.) § 255; Cent. Dig. § 792.*

[2] GRACE v. AMERICAN CENT. INS. CO., 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932; Fishback v. Western Union Telegraph Co., 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630; McEldowney v. Card (C. C.) 193 Fed. 477, 482. *See "Courts," Dec. Dig. (Key-No.) §§ 255, 261; Cent. Dig. §§ 792–794.*

Before the adoption of the federal Constitution, each state was an independent sovereign, with its own body of laws, the basis of which, as to the original thirteen states, was the English common law. The formation of the national government made no change in this respect, and the organization of the national courts merely resulted in additional tribunals, before whom questions of general jurisdiction would come in the states where they sat, and in the cases of which they are given jurisdiction. The federal court of a state is not an alien tribunal. It takes judicial notice of all things of which a court of the same state would take judicial notice, and is in many particulars, to be presently discussed, controlled by the decisions of the state court.

The fact that the United States, as a nation, have no common law, was decided very early in its history. In U. S. v. Hudson [3] an attempt was made to prosecute the defendant as guilty of a common-law libel, but the court held that the prosecution would not lie. In the later case of Wheaton v. Peters [4] the Supreme Court reiterated that there was no common law of the United States, but that the law of the state was administered by the federal court, including so much of the common law as that state had adopted.

This subject has undergone much discussion of recent years, and expressions may be found in judicial opinions intimating that there is a body of common law of the United States as a nation. They are in cases where the federal courts have not felt themselves bound by decisions of courts of the state. Properly construed they do not assert a right to administer any federal common law, but merely a right of independent judgment in deciding ques-

[3] 7 Cranch, 32, 3 L. Ed. 259. *See "Common Law," Dec. Dig. (Key-No.) § 13; Cent. Dig. § 11; "Courts," Dec. Dig. (Key-No.) § 261; Cent. Dig. § 792.*

[4] 8 Pet. 591, 8 L. Ed. 1055.

tions of general interest in which the nation at large is interested. Or, to put it in another way the federal courts in such cases are not asserting the existence of any federal common law but merely claiming the right to differ with the courts of the state on the question what is the common law when that question is one of general importance. As the federal courts were designed to protect nonresidents, this right of independent judgment as to what is the common law is essential to the accomplishment of the object for which they were created.

This distinction is well drawn by Mr. Justice Matthews in Smith v. Alabama,[5] where he says: "There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several states each for itself, applied as its local law, and subject to such alterations as may be provided by its own statutes. * * * A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the state in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of New York Cent. R. Co. v. Lockwood, 17 Wall. 357 [21 L. Ed. 627], where the common law prevailing in the state of New York, in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the state; but the law as

[5] SMITH v. ALABAMA, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508. *See "Common Law," Dec. Dig. (Key-No.) § 13; Cent. Dig. § 11; "Courts," Dec. Dig. (Key-No.) § 261; Cent. Dig. § 792.*

applied was none the less the law of that state." The language of Mr. Justice Brewer in Western Union Telegraph Co. v. Call Publishing Co.[6] probably means no more than this. So also his language in Kansas v. Colorado.[7]

THE LAW ADMINISTERED

4. A federal court of original jurisdiction administers the body of law of the state wherein it sits, whenever questions arising under that law come before it in controversies of which it is given jurisdiction.

For instance, federal courts are given cognizance of controversies between citizens of different states. Such a controversy may involve almost any question which might arise in a state court between citizens of the state, whether at common law, in equity, or questions of extraordinary remedies. In the absence of congressional enactments specially bearing upon it, the federal court would try the case substantially as the state court, following the decisions of the latter in some instances, and striking out along its own lines in others. Hence it is now necessary to consider how far state laws and decisions are binding upon the federal courts, and how far they may be disregarded.

SAME—LAW OF LOCAL STATE WHEN NO WRITTEN FEDERAL LAW APPLICABLE

5. Under section 721, Rev. St. U. S. [U. S. Comp. St. 1901, p. 581], the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall

[6] 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765.

[7] 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956. *See "Courts," Dec. Dig. (Key-No.) §§ 261, 359; Cent. Dig. §§ 792, 939–949, 978.*

be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

Under this provision it becomes necessary to consider what is meant by the "laws of the several states." In those commonwealths deriving their jurisprudence from the English common law, the body of law is either statutory or unwritten. The evidence of the latter is the decisions of the courts of the state administering it. Hence it becomes necessary to consider how far each of these two sources of state law is applied in the federal courts.

SAME—STATUTES OF LOCAL STATE

6. The statutes of a state, in so far as they regulate substantive rights, and also in so far as they regulate remedies on the common-law side of the court, are adopted and enforced by the federal courts where they do not conflict with the federal Constitution and statutes.

Under this principle, state statutes of limitations are enforced by the federal courts in common-law actions.[8] The statute of frauds of a state is enforced in the federal courts.[9] State statutes giving a right of action for damages resulting in death authorize such actions in the federal as well as the state courts.[10] State statutes permitting

[8] Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316; Security Trust Co. v. Black River Nat. Bank, 187 U. S. 230, 22 Sup. Ct. 52, 47 L. Ed. 147; Newbery v. Wilkinson (C. C.) 190 Fed. 62. *See "Courts," Dec. Dig. (Key-No.) §§ 366, 375; Cent. Dig. § 384.*

[9] Moses v. Lawrence County Bank, 149 U. S. 298, 13 Sup. Ct. 900, 37 L. Ed. 743. *See "Courts," Dec. Dig. (Key-No.) § 371; Cent. Dig. §§ 972–974.*

[10] Dennick v. Central R. Co. of New Jersey, 103 U. S. 11, 26 L. Ed. 439; Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 66, 29 Sup. Ct.

a plea of set-off, legal in its nature, authorize the filing of such a plea in similar cases in the federal courts, and a cross-judgment upon it, but not with the effect of ousting the equitable jurisdiction of the federal courts, or of conferring an equitable jurisdiction or allowing equitable defenses in such courts on their common-law side, for the distinction between law and equity is sedulously guarded in these courts.[11]

State statutes permitting compulsory surgical examinations apply to the federal courts, except where their special provisions conflict with some federal statute.[12]

But the mode of compelling an adverse party to produce documents is governed by the federal statutes.[13]

Statutes of Evidence

State statutes of evidence apply in the federal courts, being expressly adopted as to competency of witnesses.[14] Before the enactment of section 858, it had been held that state statutes of evidence were adopted by section 721 as rules of decision in the federal courts on the common-law side.[15]

397, 53 L. Ed. 695; Southern Pac. Co. v. Da Costa, 190 Fed. 689, 111 C. C. A. 417. *See "Courts," Dec. Dig. (Key-No.) § 371; Cent. Dig. § 975.*

[11] Scott v. Armstrong, 146 U. S. 499, 512, 13 Sup. Ct. 148, 36 L. Ed. 1059; Charnley v. Sibley, 73 Fed. 980, 20 C. C. A. 157; Davis v. Bessemer City Cotton Mills, 178 Fed. 784, 102 C. C. A. 232; Armstrong Cork Co. v. Merchants' Refrigerating Co., 184 Fed. 199, 107 C. C. A. 93; post, p. 390. *See "Courts," Dec. Dig. (Key-No.) §§ 335, 371; Cent. Dig. §§ 902–907½.*

[12] Union Pac. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734; Camden & S. R. Co. v. Stetson, 177 U. S. 172, 20 Sup. Ct. 617, 44 L. Ed. 721; Hanks Dental Ass'n v. International Tooth Crown Co., 194 U. S. 303, 24 Sup. Ct. 700, 48 L. Ed. 989; post, p. 403. *See "Courts," Dec. Dig. (Key-No.) § 351; Cent. Dig. § 924.*

[13] Schatz v. Winton Motor Carriage Co. (D. C.) 197 Fed. 777. *See "Courts," Dec. Dig. (Key-No.) §§ 351, 376; Cent. Dig. §§ 924, 984.*

[14] U. S. Comp. St. 1901, p. 659, as amended June 29, 1906, 34 Stat. 618, c. 3608.

[15] Ryan v. Bindley, 1 Wall. 66, 17 L. Ed. 559. *See "Courts," Dec. Dig. (Key-No.) §§ 348, 376; Cent. Dig. §§ 922, 984.*

This does not mean, however, that state decisions as to common-law rules of evidence are binding on the federal courts. In questions of evidence not statutory, the latter courts decide for themselves what the common-law rule is.[16]

By the act of July 2, 1862,[17] an express provision was inserted in the federal statute law, making the state laws as to the competency of witnesses the rules of decision in the federal courts, not only at common law, but in equity and admiralty also.

Then, after the agitation in relation to the liberation of the negro race had resulted in their emancipation, it was thought necessary to extend the rules of evidence for their protection; and the consequence was a provision in the appropriation act of July 2, 1864,[18] to the effect that in the courts of the United States there shall be no exclusion of any witness on account of color, nor, in civil actions, because he is a party to or interested in the issue tried. This was amended by the act of March 3, 1865,[19] by adding the clause in reference to executors, administrators, and guardians.

Until 1906 section 858 was a combination of these three acts. Its text was as follows: "In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other,

[16] Union Pac. Ry. Co. v. Yates, 79 Fed. 584, 25 C. C. A. 103, 40 L. R. A. 553; Chicago & N. W. Ry. Co. v. Kendall, 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560. But compare Stewart v. Morris, 89 Fed. 290, 32 C. C. A. 203. *See "Courts," Dec. Dig. (Key-No.) § 348; Cent. Dig. § 922.*

[17] 12 Stat. 588, c. 189 (U. S. Comp. St. 1901, p. 659).

[18] 13 Stat. 351, c. 210 (U. S. Comp. St. 1901, p. 659).

[19] 13 Stat. 533, c. 113 (U. S. Comp. St. 1901, p. 659).

as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty." [20]

But the amendment of June 29, 1906, cut out all but the last sentence, and rearranged it so as to read as follows: "The competency of a witness to testify in any civil action, suit or proceeding in the courts of the United States shall be determined by the laws of the state or territory in which the court is held." [21]

This renders obsolete a number of decisions based on the variant language of the federal statute and various state statutes.

Hence, under section 721, state statutes of evidence govern in the common-law courts in common-law cases, so far as they do not conflict with the other sections contained in title 13, c. 17, of the Revised Statutes, whilst under section 858 they apply to equity and admiralty courts as well, so far as they regulate the competency of witnesses, and do not conflict with other provisions of federal law.[22]

The act does not apply to criminal cases by its express language.[23]

[20] U. S. Comp. St. 1901, p. 659.

[21] 34 Stat. 618, c. 3608; Rowland v. Biesecker, 185 Fed. 515, 106 C. C. A. 615. *See "Courts," Dec. Dig. (Key-No.) § 376; Cent. Dig. §§ 925, 984.*

[22] CONNECTICUT MUT. LIFE INS. CO. v. TRUST CO., 112 U. S. 250, 5 Sup. Ct. 119, 28 L. Ed. 708; Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; Goodwin v. Fox, 129 U. S. 601, 9 Sup. Ct. 367, 32 L. Ed. 805. The recent act of February 26, 1913, makes special provision for proof of handwriting in the federal courts, allowing proof by comparison of different specimens either by witnesses or by the court or jury. *See "Courts," Dec. Dig. (Key-No.) § 376; Cent. Dig. §§ 925, 984.*

[23] Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429;

SAME—UNWRITTEN LAW OF LOCAL STATE

7. The federal court adopts not only the statutory law of the state, but its unwritten law as well, in the main. It follows the decisions of the state courts generally, but with some exceptions hereinafter noted.

SAME—CONSTRUCTION OF STATE STATUTE

8. Under this principle, the federal court adopts the construction placed upon the statute of a state by its court of last resort, if rendered before the cause of action arose.

In such case the state decision construing the statute enters into and becomes part of the statute, as far as the federal court is concerned.[24] Hence, if a state court of last resort holds one of its statutes to be valid as far as the state Constitution is concerned, such construction will be followed by a federal court.[25]

This principle applies to constructions of the state Constitution as well as to decisions on its Code.[26] It applies to

Hendrix v. U. S., 219 U. S. 79, 31 Sup. Ct. 193, 55 L. Ed. 102. *See "Courts," Dec. Dig. (Key-No.) § 376; Cent. Dig. § 984.*

[24] First Nat. Bank v. Chehalis County, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069; Smiley v. Kansas, 196 U. S. 447, 25 Sup. Ct. 289, 49 L. Ed. 546. *See "Courts," Dec. Dig. (Key-No.) § 366; Cent. Dig. §§ 954–968.*

[25] Brown v. New Jersey, 175 U. S. 172, 20 Sup. Ct. 77, 44 L. Ed. 49; Ughbanks v. Armstrong, 208 U. S. 481, 28 Sup. Ct. 372, 52 L. Ed. 582. *See "Courts," Dec. Dig. (Key-No.) § 366; Cent. Dig. §§ 954–968.*

[26] Wilkes County v. Coler, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642; Stanly County v. Coler, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. Ed. 1126; Peters v. Gilchrist, 222 U. S. 483, 32 Sup. Ct. 122, 56 L. Ed. 278. *See "Courts," Dec. Dig. (Key-No.) § 366; Cent. Dig. §§ 956, 957.*

state constructions of its statutes of limitation.[27] Also to questions relating to municipal or county organizations, their powers and boundaries.[28] The federal courts, under this principle, will follow the state decisions as to the effect of its Sunday laws upon the validity of a contract, or the right of recovery for a tort.[29] Also the construction of a state statute regulating assignments to secure creditors.[30] So as to statutes regulating sales of state lands.[31] So as to powers of state corporations.[32]

The above are illustrations of a numerous class in which the state decisions are followed. The reason is the great inconvenience that would result from having two independent and co-ordinate sets of courts administering the same body of law in different ways. Where no necessity arises of protecting the litigants for whom the federal courts were specially intended, the state decisions will be followed. But when that necessity arises, the federal courts can no longer permit their hands to be tied, and hence the exceptions to the rule spring from such necessi-

[27] Balkam v. Woodstock Iron Co., 154 U. S. 177, 14 Sup. Ct. 1010, 38 L. Ed. 953; Dibble v. Bellingham Bay Land Co., 163 U. S. 63, 16 Sup. Ct. 939, 41 L. Ed. 72. *See "Courts," Dec. Dig. (Key-No.) § 366; Cent. Dig. § 983.*

[28] Claiborne County v. Brooks, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470; Forsyth v. City of Hammond, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095; Thompson v. Searcey County, 57 Fed. 1030, 6 C. C. A. 674; General Oil Co. v. Crain, 209 U. S. 211, 28 Sup. Ct. 475, 52 L. Ed. 754. *See "Courts," Dec. Dig. (Key-No.) § 366; Cent. Dig. §§ 962, 963.*

[29] Hill v. Hite, 85 Fed. 268, 29 C. C. A. 549; Bucher v. Cheshire R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; Kuhn v. Fairmont Coal Co., 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228. *See "Courts," Dec. Dig. (Key-No.) § 366; Cent. Dig. §§ 939, 956–964.*

[30] May v. Tenney, 148 U. S. 60, 13 Sup. Ct. 491, 37 L. Ed. 368. *See "Courts," Dec. Dig. (Key-No.) § 366; Cent. Dig. § 968.*

[31] Lockard v. Asher Lumber Co., 131 Fed. 689, 65 C. C. A. 517. *See "Courts," Dec. Dig. (Key-No.) § 366; Cent. Dig. §§ 958, 959.*

[32] Anglo-American Land Mortgage & Agency Co. v. Lombard, 132 Fed. 721, 68 C. C. A. 89. *See "Courts," Dec. Dig. (Key-No.) § 366; Cent. Dig. § 962.*

ties. Therefore the state construction of the state statute is no longer binding when the question is whether that statute violates the federal statutes or Constitution—in other words, when a federal question is involved.[33] In such cases the federal courts must act upon their own convictions.

For the same reason, when a state court has upheld the validity of municipal bonds issued under a state statute, and rights have been acquired on the faith of such decision, federal courts will not feel bound by subsequent decisions denying the validity of such bonds, but will follow the first decision.[34]

So, if such bonds when issued had not been pronounced invalid by the state court, the federal court will determine their validity for itself, but it will follow the last state decision upholding the bonds.[35]

In considering the validity of municipal bonds, state decisions made before the bonds are issued will be followed.[36]

But a change in state decisions will be considered binding only as to bonds thereafter issued, and a state decision after their issue which affects their validity is not binding.[37]

[33] Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896; Central Trust Co. v. Citizens' St. Ry. Co. of Indianapolis (C. C.) 82 Fed. 1. *See "Courts," Dec. Dig. (Key-No.) § 366; Cent. Dig. §§ 954–968.*

[34] Gelpcke v. Dubuque, 1 Wall. 175, 17 L. Ed. 520. *See "Courts," Dec. Dig. (Key-No.) § 368; Cent. Dig. § 951.*

[35] Folsom v. Township Ninety-Six, 159 U. S. 611, 16 Sup. Ct. 174, 40 L. Ed. 278; Wilkes County v. Coler, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642; Wade v. Travis County, 174 U. S. 499, 19 Sup. Ct. 715, 43 L. Ed. 1060. *See "Courts," Dec. Dig. (Key-No.) §§ 365, 366; Cent. Dig. §§ 951–963.*

[36] Lytle v. Lansing, 147 U. S. 59, 13 Sup. Ct. 254, 37 L. Ed. 78. *See "Courts," Dec. Dig. (Key-No.) § 366; Cent. Dig. §§ 354–368.*

[37] Douglass v. Pike County, 101 U. S. 677, 25 L. Ed. 968; Knox County v. Ninth Nat. Bank, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. Ed. 93; Loeb v. Columbia Tp., 179 U. S. 472, 21 Sup. Ct. 174, 45 L. Ed. 280. *See "Courts," Dec. Dig. (Key-No.) § 368; Cent. Dig. § 951.*

In Burgess v. Seligman [38] similar principles were applied as to the liability of a stockholder under a state statute. When the federal court has construed such a statute in the absence of any decision by the state court, it will not feel bound to change its decision on account of a subsequent state court decision construing the statute differently.

STATE LAW OF TITLE TO REAL PROPERTY

9. The federal courts follow the state decisions in relation to title to real property.

This is because the state decisions establish rules of property on which titles and rights are acquired, and to unsettle them would introduce uncertainty too great to be endured.[39] They do not, however, feel bound to follow the state decisions as to the construction of a particular devise not depending on any general settled rule of property in the state.[40]

[38] 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359. *See "Courts," Dec. Dig. (Key-No.) § 369; Cent. Dig. §§ 953, 953½.*

[39] LOWNDES v. HUNTINGTON, 153 U. S. 1, 14 Sup. Ct. 758, 38 L. Ed. 615; St. Anthony Falls Water Power Co. v. Board of Water Com'rs, 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497; Sauer v. New York, 206 U. S. 536, 27 Sup. Ct. 686, 51 L. Ed. 1176; Seefeld v. Duffer, 179 Fed. 214, 103 C. C. A. 32; The Golden Rod (D. C.) 197 Fed. 830. *See "Courts," Dec. Dig. (Key-No.) § 367; Cent. Dig. §§ 958, 959.*

[40] Barber v. Pittsburg, Ft. W. & C. R. Co., 166 U. S. 83, 17 Sup. Ct. 488, 41 L. Ed. 925. *See "Courts," Dec. Dig. (Key-No.) §§ 366, 367; Cent. Dig. §§ 954–960.*

CONTRACT OR PERSONAL RELATIONS

10. They follow the state decisions in general, in matters of contract or in personal relations.

Hence the state decisions are adopted as to the validity of a state marriage and the rights of married women.[41] Also in questions whether contracts made within the state and operating therein are in accordance with public policy.[42] So as to conditional sales and chattel mortgages.[43] Also as to the liability of a municipal corporation for torts.[44]

NOT BOUND BY STATE LAW IN QUESTIONS OF GENERAL OR COMMERCIAL CHARACTER

11. In questions of a general or commercial character unaffected by local statute the federal courts do not feel bound by the state decisions, but act upon their own convictions of what is right.

This right in a federal court of deciding for itself questions of general law was laid down as to questions arising

[41] Meister v. Moore, 96 U. S. 76, 24 L. Ed. 826; Slaughter v. Glenn, 98 U. S. 242, 25 L. Ed. 122; Canal Bank of New Orleans v. Partee, 99 U. S. 325, 25 L. Ed. 390. *See "Courts," Dec. Dig. (Key-No.) § 366; Cent. Dig. §§ 954–968.*

[42] Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474; Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co., 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84. *See "Courts," Dec. Dig. (Key-No.) § 366; Cent. Dig. §§ 954–968.*

[43] Bryant v. Swofford Bros. Dry Goods Co., 214 U. S. 279, 29 Sup. Ct. 615, 53 L. Ed. 997. *See "Courts," Dec. Dig. (Key-No.) § 366; Cent. Dig. §§ 954–968.*

[44] Clarke v. Atlantic City (C. C.) 180 Fed. 598. *See "Courts," Dec. Dig. (Key-No.) § 366; Cent. Dig. §§ 954–968.*

under the law merchant in the early case of Swift v. Tyson.[45] Such a right would appear essential in order for a federal court to guard the interests of nonresidents against the possibility of state decisions laying down rules which would work in favor of the resident. The law merchant being common to all civilized nations, a federal court could not tie itself down to the theory of treating it as a local rule of action.[46]

The construction of insurance contracts is also a question of general law, as to which the federal courts feel at liberty to form their own opinions.[47]

The liability of common carriers, the validity of stipulations in their bills of lading, the measure of damages in suits against them, are also matters of general interest, as to which the federal courts act independently, except in so far as such matters are validly regulated by state statute.[48]

The federal courts also consider the law of master and servant as one of general interest, and not of mere local concern; and hence they decide for themselves whether a given case is a case of fellow service or of liability, regardless of the state decisions and in the absence of statute. As the federal decisions on the subject differ widely

[45] 16 Pet. 1, 10 L. Ed. 865. *See "Courts," Dec. Dig. (Key-No.) § 372; Cent. Dig. §§ 977–979.*

[46] Brooklyn City & N. R. Co. v. National Bank of the Republic, 102 U. S. 14, 26 L. Ed. 61; Phipps v. Harding, 70 Fed. 468, 17 C. C. A. 203, 30 L. R. A. 513; Dygert v. Trust Co., 94 Fed. 913, 37 C. C. A. 389; Forrest v. Safety Banking & Trust Co. (C. C.) 174 Fed. 345. *See "Courts," Dec. Dig. (Key-No.) § 372; Cent. Dig. §§ 977–979.*

[47] Washburn & Moen Mfg. Co. v. Reliance M. Ins. Co., 179 U. S. 1, 15, 21 Sup. Ct. 1, 45 L. Ed. 49; Gordon v. Ware Nat. Bank, 132 Fed. 444, 65 C. C. A. 580, 67 L. R. A. 550. *See "Courts," Dec. Dig. (Key-No.) § 372; Cent. Dig. §§ 977–979.*

[48] Myrick v. Michigan Cent. Ry. Co., 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325; Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97; New York Cent. R. Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627. *See "Courts," Dec. Dig. (Key-No.) § 372; Cent. Dig. §§ 977–979.*

from those of some states, this makes the selection of the forum a very important step in many of these cases.[49]

The federal courts follow their own judgment as to the measure of damages.[50] Also as to questions of negligence.[51]

[49] Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Snipes v. Southern R. Co., 166 Fed. 1, 91 C. C. A. 593; Illinois Cent. R. Co. v. Hart, 176 Fed. 245, 100 C. C. A. 49. *See "Courts," Dec. Dig. (Key-No.) § 372; Cent. Dig. §§ 977–979.*

[50] Western Union Tel. Co. v. Burris, 179 Fed. 92, 102 C. C. A. 386; Norfolk & P. Traction Co. v. Miller, 174 Fed. 607, 98 C. C. A. 453; Woldson v. Larson, 164 Fed. 548, 90 C. C. A. 422; H. T. Smith Co. v. Minetto-Meriden Co. (C. C.) 168 Fed. 777. *See "Courts," Dec. Dig. (Key-No.) § 366; Cent. Dig. §§ 977–979.*

[51] Force v. Standard Silk Co. (C. C.) 160 Fed. 992; Id., 170 Fed. 184, 95 C. C. A. 286; Snare & Triest Co. v. Friedman, 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367. *See "Courts," Dec. Dig. (Key-No.) § 366; Cent. Dig. §§ 977–979.*

CHAPTER II

THE DISTRICT COURT—ITS CRIMINAL JURISDICTION AND PRACTICE

12. The Federal Judicial System.
13. The District Court.
14. Criminal Jurisdiction of the District Courts.
15. Criminal Procedure.
16. Procedure by Complaint.
17. United States Commissioners.
18. Place of Trial—Warrant of Removal.
19. Same—Proper Place.

THE FEDERAL JUDICIAL SYSTEM

12. The judicial power of the United States is vested in one Supreme Court, established by the Constitution, and various inferior courts organized by Congress under the authority of the Constitution.

The Original United States Courts, and Their Evolution into the Present System

Article 3, § 1, of the Constitution, provides that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish. It thus appears that the only court established by the Constitution is the Supreme Court. The others are creatures of congressional action.

Acting under this authority, Congress, by the judiciary act of 1789, established the first federal courts, and distributed the jurisdiction among them. They divided the United States, as then constituted, into judicial districts, no district containing more than one state, and established in each district a district court and a circuit court. Since then, as the country grew, additional districts and circuits

have been established. This original act, with subsequent enlargements, is now embodied in the Judicial Code of March 3, 1911, in effect January 1, 1912.[1] These district and circuit courts were given by the original act of 1789 all of the original jurisdiction which the United States courts then exercised, except the small amount conferred upon the Supreme Court. Until 1891 the circuit court had some appellate supervision over the district court.

Under the original act, a judge, known as the district judge, was to be chosen, who was to hold both the district court and the circuit court in his district, except in cases of appeals from his own decisions in the district court.[2] In order to provide for this case, and also for holding the circuit court in cases of special interest, the nation was divided into larger units, known as circuits; and one justice of the United States Supreme Court was assigned to each of these circuits. This Supreme Court justice could hold the circuit court of any district contained in his circuit. He could sit with the district judge; or, in cases of appeals from the district court to the circuit court, he it was who heard and disposed of those appeals. This continued to be the system until just after the Civil War, when an additional judge, known as a circuit judge, was provided for each circuit; the main object being to relieve the justices of the Supreme Court from the labor of holding the circuit court, as the growth of business in the Supreme Court had rendered it impracticable for them to continue to do much circuit court work. Then by the act of March 3, 1891, establishing the circuit courts of appeals,[3] additional circuit judges were established. This scheme of distributing the main federal original jurisdiction between the district and circuit courts, the district

[1] 36 Stat. 1087 (U. S. Comp. St. Supp. 1911, p. 128).
[2] Section 551, Rev. St. (U. S. Comp. St. 1901, p. 446).
[3] U. S. Comp. St. 1901, p. 547.

court having in the main the cases of special jurisdiction, and the circuit court the cases of more usual character, continued until 1911. By that time it had been increasingly realized that the great mass of the work in the circuit courts was being done by the district judges. Committees and commissions had been for several years engaged in rearranging and codifying. The result was first the Penal Code of March 4, 1909, in effect January 1, 1910,[4] and next the Judicial Code of March 3, 1911, in effect January 1, 1912,[5] which abolished the circuit court entirely and amalgamated its jurisdiction with that of the district court, thus making the latter practically the sole repository of the jurisdiction in which the bar at large is interested. This latter act codifies and includes the first thirteen chapters of the judiciary title of the Revised Statutes,[6] chapter 15 on juries,[7] and chapters 20 and 21 relating to the court of claims.[8] Chapters 14 on district attorneys, marshals and clerks, 16 on fees, 17 on evidence, 18 on procedure and 19 on limitations are yet to be codified.

There are also many courts of special jurisdiction which have been established since the original act. One of these is the court of claims, established in 1855.[9] There are also the courts of the District of Columbia and the courts of the territories; and then there are the courts of appellate jurisdiction, consisting of the circuit courts of appeals, established by the act of March 3, 1891,[10] and the Supreme Court, which, as already mentioned, was established by the Constitution itself.

It will now be necessary to review the organization, jurisdiction, and practice of these several courts.

[4] 35 Stat. 1088 (U. S. Comp. St. Supp. 1911, p. 1588).
[5] 36 Stat. 1087 (U. S. Comp. St. Supp. 1911, p. 128).
[6] Title 13 (U. S. Comp. St. 1901, pp. 306–597).
[7] Id. pp. 623–630.
[8] U. S. Comp. St. 1901, pp. 729–764.
[9] Sections 1049–1093, Rev. St. (U. S. Comp. St. 1901, p. 729 et seq.).
[10] U. S. Comp. St. 1901, p. 546.

THE DISTRICT COURT

13. The district courts are courts of original jurisdiction, each having territorial supervision over an area known as a judicial district, and held by a judge known as a district judge.

The District Court, and Its Personnel

This court is held by the district judge, who is required to live within his district. The districts being defined largely by state lines, the territorial jurisdiction of the district courts follows the lines as laid down by the act of the states. When two states agree as to a boundary line which has been in dispute, and the effect of such agreement is to throw into one state territory which had been in another, the corresponding district court extends over such new territory.[11]

The statutes contain various provisions for holding the district court, if for any reason the district judge of that district is prevented from sitting. These provisions will be found in sections 13 to 23 of the Judicial Code. The first of these sections applies in terms only to cases of disability of the district judge, and apparently does not apply to a case where there is a vacancy in the office.[12] The only provisions expressly applying to vacancies are sections 22 and 23. Apparently, however, the language of section 14, which allows the designation of another judge in case of accumulation of business, would permit such designation, not only when business has accumulated on account of an unusual press of litigation, or on account of disability, but also where there is a vacancy. In any event, if the ap-

[11] In re Devoe Mfg. Co., 108 U. S. 401, 2 Sup. Ct. 894, 27 L. Ed. 764. *See "Courts," Dec. Dig. (Key-No.) § 419; Cent. Dig. § 1120.*

[12] Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377. *See "Courts," Dec. Dig. (Key-No.) § 421; Cent. Dig. § 1121.*

pointment of another judge to hold court in case of accumulation of business is made, and there is nothing on the record to show that there is an actual vacancy in the office, the act of a judge so holding court could not be questioned; for he would be a judge de facto, and his acts would be binding upon litigants.[18]

There is also a provision contained in section 20 of the Judicial Code providing for the case where a district judge is so interested in a suit that it would be improper for him to sit, or is a material witness.

General Nature of the Jurisdiction of the District Court

As a rule, the jurisdiction conferred upon the district court was of an exceptional or special character; the great mass of civil controversies of which the federal courts are given original jurisdiction having been conferred upon the circuit court. But now its jurisdiction is very extensive, and covers cases cognizable both in criminal courts, the common-law courts, and the chancery courts, to say nothing of the courts of extraordinary jurisdiction, like the admiralty and bankruptcy courts.

CRIMINAL JURISDICTION OF THE DISTRICT COURTS

14. The second clause of section 24 of the Judicial Code gives the district courts jurisdiction of all crimes and offenses cognizable under the authority of the United States committed within their respective districts or upon the high seas.

In this connection it must be remembered that there is no such thing as a common-law offense against the United States, but offenses are statutory only; and, in order to

[18] McDowell v. U. S., 159 U. S. 596, 16 Sup. Ct. 111, 40 L. Ed. 271. *See "Judges," Dec. Dig. (Key-No.) § 6; Cent. Dig. §§ 11, 12.*

sustain a prosecution under this section, some act of Congress other than section 24 must be specified which creates such an offense.[14]

Crimes against the United States are nearly all contained in the Penal Code of March 4, 1909.[15]

Most of these statutes punishing crimes against the person applied to lands or reservations under the exclusive jurisdiction of the United States, or, in case of offenses on the water, to such waters as are not only within the admiralty and maritime jurisdiction of the United States, but are also out of the jurisdiction of any particular state. Under this provision, crimes of this nature committed in a harbor, or in a body of water bounded on each side by the same state, are not cognizable by the federal courts, but the punishment of such offenses is left to the state courts.[16] It had also been held that the statutes giving the federal courts jurisdiction over offenses committed on the high seas apply to the Great Lakes, the Supreme Court holding that in the proper sense of the term the Great Lakes are high seas, just as much as the Mediterranean or the Baltic. This was decided in U. S. v. Rodgers,[17] which was a case where the offense was committed in 1887, and the decision was rendered in 1893. Prior to the decision in that case,

[14] Pettibone v. U. S., 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419; U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591; U. S. v. Martin (D. C.) 176 Fed. 110. *See "Criminal Law," Dec. Dig. (Key-No.) § 89; Cent. Dig. § 128.*

[15] 35 Stat. 1088 (U. S. Comp. St. Supp. 1911, p. 1588).

[16] U. S. v. ROGERS (D. C.) 46 Fed. 1; SAME v. RODGERS, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071; Ex parte Ballinger (D. C.) 5 Hughes, 387, 88 Fed. 781; U. S. v. Peterson (D. C.) 64 Fed. 145; U. S. v. Bevans, 3 Wheat. 336, 4 L. Ed. 404; Wynne v. U. S., 217 U. S. 234, 30 Sup. Ct. 447, 54 L. Ed. 748; Ex parte O'Hare, 179 Fed. 662, 103 C. C. A. 220. *See "Criminal Law," Dec. Dig. (Key-No.) § 97; Cent. Dig. §§ 183–190.*

[17] U. S. v. RODGERS, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071. *See "Criminal Law," Dec. Dig. (Key-No.) § 97; Cent. Dig. §§ 183–190.*

however, Congress, by the act of September 4, 1890,[18] had expressly provided for an extension of the criminal jurisdiction of the federal courts over the Great Lakes and their connecting waters. In the Penal Code the rulings of the courts were adopted, and the subject made clear by the insertion of a section covering the subject.[19]

It is impossible within the limits of this treatise to discuss the statutes defining the various crimes against the United States. It is not the national policy to create offenses cognizable by the United States courts, except in so far as it may be necessary to see to the proper execution of the federal laws. The great mass of offenses are offenses against the states, and not the United States; and the offenses against the latter relate principally to offenses on the high seas which would not fall under the authority of any single state, to offenses committed on lands under the exclusive jurisdiction of the United States, like forts and military reservations, and to offenses against the customs and revenue laws, the pension laws, the postal laws, and the national banking laws. It is essential to the proper administration of the government that these offenses should be cognizable by the federal courts. Under article 1, § 8, cl. 17, of the Constitution, Congress is given the power of exclusive legislation over the seat of government, and over all places purchased by consent of the Legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and all other needful buildings. Under this clause the jurisdiction of the United States courts over crimes committed on such places is necessarily exclusive,[20] but even under this clause the letter of the Constitution is followed, and, in case of land pur-

[18] U. S. Comp. St. 1901, p. 3627.

[19] Penal Code, § 272 (U. S. Comp. St. Supp. 1911, p. 1671).

[20] Sharon v. Hill (C. C.) 24 Fed. 726; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264; U. S. v. Press Publishing Co., 219 U. S. 1, 31 Sup. Ct. 212, 55 L. Ed. 65, 21 Ann.

chased by the United States without the assent of the state, the jurisdiction is not necessarily exclusive.[21]

In speaking of offenses exclusively cognizable by the United States courts, the offense, in so far as it is an offense against the federal law, is necessarily exclusively punishable by the federal courts.[22] But in many cases the same act or state of facts may be an offense both against the state laws and the federal laws, and in such case the offender may be prosecuted in both courts, though the first court that arrests him would not permit interference by the other court.[23] The offenses created and defined by the federal statutes in reference to federal buildings or other lands owned by the United States or under their exclusive jurisdiction are substantially the usual offenses punishable in the state courts. By way of extra precaution, it is provided by section 289 of the Penal Code that anything which is an offense under the law of the state in which such place is situated shall be an offense against the United States and punishable as it is by the state law in force at the time of the enactment of that section, which went into effect on January 1, 1910.[24]

Cas. 942; Judicial Code, § 256 (U. S. Comp. St. Supp. 1911, p. 233). *See "Criminal Law," Dec. Dig. (Key-No.) § 97; Cent. Dig. §§ 183–190.*

[21] U. S. v. Penn (C. C.) 48 Fed. 669. *See "Criminal Law," Dec. Dig. (Key-No.) § 97; Cent. Dig. §§ 183–190.*

[22] Thomas v. Loney, 134 U. S. 372, 10 Sup. Ct. 584, 33 L. Ed. 949; Fitzgerald v. Green, 134 U. S. 377, 10 Sup. Ct. 586, 33 L. Ed. 951; Ohio v. Thomas, 173 U. S. 276, 19 Sup. Ct. 453, 43 L. Ed. 699; Ex parte Roach (D. C.) 166 Fed. 344; Commonwealth v. Kitchen, 141 Ky. 655, 133 S. W. 586. *See "Criminal Law," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 167–175.*

[23] Penal Code, § 326 (U. S. Comp. St. Supp. 1911, p. 1685); Cross v. North Carolina, 132 U. S. 131, 10 Sup. Ct. 47, 33 L. Ed. 287; Crossley v. California, 168 U. S. 640, 18 Sup. Ct. 242, 42 L. Ed. 610; Callahan v. U. S., 195 Fed. 924, 115 C. C. A. 612. *See "Criminal Law," Dec. Dig. (Key-No.) § 100; Cent. Dig. § 114.*

[24] U. S. v. Press Publishing Co., 219 U. S. 1, 31 Sup. Ct. 212, 55 L. Ed. 65, 21 Ann. Cas. 942. *See "Criminal Law," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 183–190.*

CRIMINAL PROCEDURE

15. Criminal proceedings in the federal courts are instituted
 (a) By complaint before an examining officer, looking to an indictment;
 (b) By indictment or information, as the initial step.

PROCEDURE BY COMPLAINT

16. It is provided that, upon complaint under oath before them, a justice or judge of the United States, a United States commissioner, and certain state officers of the state wherein the offender is found, may have the offender arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense, under procedure agreeable to the usual mode of process against offenders in the state in which the procedure is being conducted.

UNITED STATES COMMISSIONERS

17. The officers before whom offenders are usually brought under this procedure are the United States commissioners. These officers have various powers, similar on the criminal side to the ordinary magistrates in the judicial systems of the states.

Section 1014, Rev. St.,[25] also provides that in such case the procedure shall be agreeably to the usual mode of pro-

[25] U. S. Comp. St. 1901, p. 716.

cess against offenders in such state. The usual procedure under this section is by complaint on oath before some of the above officers. The fourth amendment to the Constitution provides that no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. Under these constitutional and statutory provisions, it has been held that a complaint must be on oath, of personal knowledge, and not merely on an oath or affirmation of mere belief.[26] The procedure in such case follows the usual practice of the state, as required by the statute, and the officer issuing the warrant proceeds as the corresponding state officer would proceed.[27] The procedure by indictment or information, in cases where an information lies, is also very common and well known.[28]

The Warrant

On complaint duly sworn to as above described, the officer issues a warrant of arrest to bring the prisoner before him at a given time and place. It is not necessary, however, that the warrant should be returned before the officer issuing it, for by the act of August 18, 1894,[29] it must be returned by the marshal before the nearest judicial officer who has jurisdiction for a hearing, commitment, or taking of bail; the object of this act being to prevent excessive

[26] U. S. v. Burr, Fed. Cas. No. 14,692; U. S. v. Collins (D. C.) 79 Fed. 65; Rice v. Ames, 180 U. S. 371, 21 Sup. Ct. 406, 45 L. Ed. 577. *See "Criminal Law," Dec. Dig. (Key-No.) § 209; Cent. Dig. §§ 415–420.*

[27] U. S. v. Sauer (D. C.) 73 Fed. 671; U. S. v. Dunbar, 83 Fed. 151, 27 C. C. A. 488; U. S. v. Zarafonitis, 150 Fed. 97, 80 C. C. A. 51, 10 Ann. Cas. 290; Zarafonitis v. U. S., 156 Fed. 1023, 84 C. C. A. 680. *See "Courts," Dec. Dig. (Key-No.) § 337; Cent. Dig. § 908; "Criminal Law," Dec. Dig. (Key-No.) § 209; Cent. Dig. §§ 415–420.*

[28] U. S. v. Baumert (D. C.) 179 Fed. 735. *See "Criminal Law," Dec. Dig. (Key-No.) § 211; Cent. Dig. §§ 420–431; "Indictment and Information," Dec. Dig. (Key-No.) §§ 3, 9, 36.*

[29] U. S. Comp. St. 1901, p. 717.

costs by having commissioners issue warrants for parties at great distances, thereby multiplying both commissioner's and marshal's fees.

The warrant must, as required by amendment 4 to the Constitution, particularly describe the person to be arrested. Consequently a warrant not conforming to this requirement would be illegal. As an illustration, in West v. Cabell [30] the warrant was against James West. Under it the officer arrested Vandy West. The warrant was held to be void, though testimony was adduced to show that Vandy West was really the man who was in the mind of the commissioner when the warrant was issued.

A seal is not essential to the validity of the warrant. If there is no statute requiring it, and the officer issuing it has no seal, but it is merely signed, the warrant is valid.[31]

United States Commissioners

When the warrant has been issued and the accused arrested, he is brought before the committing officer for a preliminary examination. The officer before whom he is usually brought in such case is now known as a United States commissioner. By the act of May 28, 1896,[32] the office of circuit court commissioner was abolished, and that of United States commissioner established. This officer has various powers, similar on the civil side to those of a notary public, and on the criminal side to those of a magistrate. His powers are summarized in U. S. v. Allred [33] as follows: "The duties of these officers are prescribed by law, and they are, in general, to issue warrants for offenses

[30] 153 U. S. 78, 14 Sup. Ct. 752, 38 L. Ed. 643. See, also, U. S. v. Doe (D. C.) 127 Fed. 982; Todd v. U. S., 158 U. S. 278, 15 Sup. Ct. 889, 39 L. Ed. 982. *See "Criminal Law," Dec. Dig. (Key-No.) § 218; Cent. Dig. §§ 444–453.*

[31] Starr v. U. S., 153 U. S. 614, 14 Sup. Ct. 919, 38 L. Ed. 841. *See "Criminal Law," Dec. Dig. (Key-No.) § 218; Cent. Dig. § 448.*

[32] U. S. Comp. St. 1901, p. 499.

[33] 155 U. S. 591, 15 Sup. Ct. 231, 39 L. Ed. 273. *See "United States Commissioners," Dec. Dig. (Key-No.) §§ 4–7; Cent. Dig. § 3.*

against the United States; to cause the offenders to be arrested and imprisoned, or bailed, for trial, and to order the removal of offenders to other districts (Rev. St. § 1014 [U. S. Comp. St. 1901, p. 716]); to hold to security of the peace and for good behavior (section 727 [U. S. Comp. St. 1901, p. 584]); to carry into effect the award or arbitration, or decree of any consul of any foreign nation; to sit as judge or arbitrator in such differences as may arise between the captains and crews of any vessels belonging to the nations whose interests are committed to his charge; and to enforce obedience by imprisonment until such award, arbitration, or decree is complied with (section 728); to take bail and affidavits in civil causes (section 945 [U. S. Comp. St. 1901, p. 694]); to discharge poor convicts imprisoned for nonpayment of fines (section 1042 [U. S. Comp. St. 1901, p. 724]); to take oaths and acknowledgments (section 1778 [U. S. Comp. St. 1901, p. 1211]); to institute prosecutions under the laws relating to crimes against the elective franchise, and civil rights of citizens, and to appoint persons to execute warrants thereunder (sections 1982–1985 [U. S. Comp. St. 1901, pp. 1264, 1265]); to issue search warrants authorizing internal revenue officers to search premises, where a fraud upon the revenue has been committed (section 3462 [U. S. Comp. St. 1901, p. 2283]); to issue warrants for deserting foreign seamen (section 5280 [U. S. Comp. St. 1901, p. 3598]); to summon masters of vessels to appear before him and show cause why process should not issue against such vessel (section 4546 [U. S. Comp. St. 1901, p. 3087]); to issue warrants for and examine persons charged with being fugitives from justice (sections 5270 and 5271 [U. S. Comp. St. 1901, pp. 3591, 3593]); and to take testimony and proofs of debt in bankruptcy proceedings (sections 5003 and 5076)."

His duties under section 1014 are assimilated to those of a state committing magistrate, and in holding the prelim-

inary examination of the accused he acts as a state magistrate would act under the state practice.[34] In this respect, however, he is in no sense holding a court of the United States, but is acting simply as a committing magistrate.[35] As the Constitution requires that no warrant shall issue but upon probable cause, it becomes his duty, in holding such examination, and in issuing the warrant in the first instance, to examine into the question whether there is probable cause to believe that the accused has committed any offense. In making this inquiry, he may examine into the facts, and in fact it is usually necessary for him to do so, in order to decide whether the prisoner is entitled to bail.[36] Under section 1015 of the Revised Statutes, the prisoner is entitled to bail in all except capital cases, and the United States commissioner may decide whether to admit him to bail or not; and this he may do either when holding an examination under a warrant issued on complaint, or when the other procedure by indictment has been taken, and the prisoner has been arrested on the indictment.[37] If bail is wanted in capital cases, the commissioner has no power to take it, but in such cases only some federal judge has the power to take bail.

The preliminary examination is a valuable right, and the

[34] U. S. v. Martin (D. C.) 17 Fed. 150; U. S. v. Greene (D. C.) 100 Fed. 941; Greene v. Henkel, 183 U. S. 249, 22 Sup. Ct. 218, 46 L. Ed. 177. *See "United States Commissioners," Dec. Dig. (Key-No.) § 7; Cent. Dig. § 3.*

[35] Todd v. U. S., 158 U. S. 278, 15 Sup. Ct. 889, 39 L. Ed. 982; U. S. v. Tom Wah (D. C.) 160 Fed. 207; Tom Wah v. U. S., 163 Fed. 1008, 90 C. C. A. 178. *See "United States Commissioners," Dec. Dig. (Key-No.) § 7; Cent. Dig. § 3.*

[36] U. S. v. Smith (C. C.) 17 Fed. 510; U. S. v. Hughes (D. C.) 70 Fed. 972. *See "Bail," Dec. Dig. (Key-No.) § 47; Cent. Dig. § 174.*

[37] U. S. v. Sauer (D. C.) 73 Fed. 671; Hoeffner v. U. S., 87 Fed. 185, 30 C. C. A. 610; Id., 87 Fed. 1005, 31 C. C. A. 594; U. S. v. Louis (C. C.) 149 Fed. 277. *See "Bail," Dec. Dig. (Key-No.) § 47; Cent. Dig. § 174.*

prisoner can have it either on prosecutions instituted by complaint or by indictment.[38]

If the commissioner thinks that there is probable cause to believe that the accused has committed the crime with which he is charged he may commit him for trial, a writ being necessary in such case.[39]

Under the sixth amendment to the Constitution, the accused is entitled, among other things, to have compulsory process for obtaining witnesses in his favor. Pursuant to this provision, section 879 of the Revised Statutes [40] gives the commissioner who holds this examination the right to require the defendant's witnesses, in case of offenses on the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States, to be recognized to appear at that place where the accused will need their testimony.

PLACE OF TRIAL—WARRANT OF REMOVAL

18. To insure the constitutional guaranty of a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, it is provided that, where an offender is committed in any district other than that where the offense is to be tried, the judge of the district where he is committed shall issue a warrant to remove him to the district where the trial is to be had.

[38] U. S. v. Farrington (D. C.) 5 Fed. 343. *See "Criminal Law," Dec. Dig. (Key-No.) § 223; Cent. Dig. §§ 463–465.*

[39] Erwin v. U. S. (D. C.) 37 Fed. 470, 2 L. R. A. 229; U. S. v. Harden (D. C.) 10 Fed. 802. *See "Criminal Law," Dec. Dig. (Key-No.) § 241; Cent. Dig. §§ 458, 501–508.*

[40] U. S. Comp. St. 1901, p. 668.

SAME—PROPER PLACE

19. The proper place for the trial of offenses committed within any district is in that district, and the proper place for the trial of offenses committed on the high seas or outside of any district at all is the district where the offender is found or where he is first brought.

Warrant of Removal

The sixth amendment to the Constitution provides that the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. In conformity to this provision, section 1014 also provides that, where an offender is committed in any district other than that where the offense is to be tried, the judge of the district where he is committed shall issue a warrant to remove him to the district where the trial is to be had. This warrant of removal must show on its face that such a trial of some offense is to be had, though it is not very technical in its form. For instance, in U. S. v. Horner,[41] the warrant transferring him to another district stated that the prisoner was to be tried "on such counts of the indictment as he can be legally tried on in said district." There was at least one count in the indictment which showed jurisdiction in the court of the district to try him, and it was held that the warrant was sufficiently definite.

When a judge is requested under this provision to issue such a warrant of transfer, he acts not merely in a ministerial capacity, but in a judicial one; and he may examine into the case, certainly so far as to inspect the proceedings

[41] (D. C.) 44 Fed. 677; Horner v. U. S., 143 U. S. 207, 12 Sup. Ct. 407, 36 L. Ed. 126. *See "Criminal Law," Dec. Dig. (Key-No.) § 242; Cent. Dig. §§ 509, 510.*

and see that the court to which he is asked to move the prisoner has jurisdiction. As to the question of fact, a certified copy of the indictment is prima facie, but not conclusive, evidence, and would justify him in sending the prisoner on, though he would have the right, in his discretion, to hear additional evidence if he saw fit.[42] When an application is made by the authorities of another district to a judge to remove the prisoner to such district for trial, it ought to show that proceedings have been instituted in such district, though not necessarily an indictment.[43] The prisoner is entitled to notice of the time when the judge is to examine into the question of sending him to another district, but before any removal an examination or an indictment in one of the two districts is necessary.[44] A removal to the District of Columbia is authorized by the act.[45]

The Place of Trial

Article 3, § 2, of the Constitution, provides that the trial shall be held in the state where the crime shall have been committed, but when not committed within any state the trial shall be at such place or places as the Congress may by law have directed; and the sixth amendment provides that the trial shall be in the state and district wherein the crime shall have been committed. The provisions of these amendments apply only to trials in the federal courts, not

[42] Price v. McCarty, 89 Fed. 84, 32 C. C. A. 162; In re Wood (D. C.) 95 Fed. 288; U. S. v. Greene (D. C.) 100 Fed. 941; Greene v. Henkel, 183 U. S. 249, 22 Sup. Ct. 218, 46 L. Ed. 177; Price v. Henkel, 216 U. S. 488, 30 Sup. Ct. 257, 54 L. Ed. 581. *See "Criminal Law," Dec. Dig. (Key-No.) § 242; Cent. Dig. §§ 509, 510.*

[43] U. S. v. Price (D. C.) 84 Fed. 636; Greene v. Henkel, 183 U. S. 249, 22 Sup. Ct. 218, 46 L. Ed. 177. *See "Criminal Law," Dec. Dig. (Key-No.) § 242; Cent. Dig. §§ 509, 510.*

[44] U. S. v. Karlin (D. C.) 85 Fed. 963; U. S. v. Yarborough (D. C.) 122 Fed. 293. *See "Criminal Law," Dec. Dig. (Key-No.) § 242; Cent. Dig. §§ 509, 510.*

[45] Benson v. Henkel, 198 U. S. 1, 25 Sup. Ct. 569, 49 L. Ed. 919. *See "Criminal Law," Dec. Dig. (Key-No.) § 242; Cent. Dig. §§ 509, 510.*

to proceedings in the state courts, and they apply only to strictly criminal proceedings, not to contempt proceedings.[46] In furtherance of these constitutional provisions, section 40 of the Judicial Code provides that the trial of capital offenses shall be had in the county where the offense was committed, where it can be done without great inconvenience. Section 41 provides that the trial of offenses committed on the high seas or elsewhere, out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought; and section 42 provides that where an offense is begun in one judicial circuit, and completed in another, it shall be deemed to have been committed in either, and may be dealt with in either. Under these constitutional and statutory provisions, the proper place for the trial of offenses committed within any district is that district.

It may be sometimes a difficult question to decide just where an offense has been committed. That depends upon the character of the offense, and the proper construction of the statute creating it. To illustrate, it was held in Re Palliser[47] that a New York party who wrote to a Connecticut postmaster, offering to buy stamps on credit, against the statute forbidding it, committed his offense in Connecticut, where the letter was received, and the Connecticut district was the proper place where he should be tried. So, too, in U. S. v. Horner,[48] where a lottery ticket

[46] Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352; Ellenbecker v. District Court, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; In re Cole, 163 Fed. 180, 184, 90 C. C. A. 50, 23 L. R. A. (N. S.) 255. *See "Criminal Law," Dec. Dig. (Key-No.) § 242; Cent. Dig. §§ 509, 510.*

[47] (C. C.) 40 Fed. 575; Palliser v. U. S., 136 U. S. 257, 10 Sup. Ct. 1034, 34 L. Ed. 514. *See "Criminal Law," Dec. Dig. (Key-No.) § 97; Cent. Dig. §§ 177–191.*

[48] (D. C.) 44 Fed. 677; Horner v. U. S., 143 U. S. 207, 12 Sup. Ct. 407, 36 L. Ed. 126. *See "Criminal Law," Dec. Dig. (Key-No.) § 97; Cent. Dig. §§ 177–191.*

was mailed in New York to a party in Illinois, it was held that the offense was triable in Illinois. The proper venue of an indictment against a senator for receiving illegal compensation under section 1782 of the Revised Statutes [49] is where the money was put to his credit in bank.[50] The Supreme Court, however, has never finally settled definitely where the prosecution for murder should be tried, if the fatal blow was given in one district and the death occurred in another, though the question is discussed in Palliser v. U. S.[51] and Ball v. U. S.[52] The question is set at rest by section 336 of the Penal Code, which places the commission of the crime of murder or manslaughter at the place where the injury or other cause of death happened.

In a prosecution for a conspiracy the venue may be laid wherever an overt act is performed by any one of the conspirators.[53]

The constitutional provision in reference to trying the case in the district where it arose does not, however, prevent Congress from enacting, as it has done in section 41 of the Judicial Code, that the trial of offenses on the high seas, or outside of any district at all, shall be in the district where the offender is found or into which he is first brought.[54]

In U. S. v. Arwo [55] a murder had been committed on the

[49] U. S. Comp. St. 1901, p. 1212.

[50] Burton v. U. S., 196 U. S. 283, 25 Sup. Ct. 243, 49 L. Ed. 482. *See "Criminal Law," Dec. Dig. (Key-No.) § 113; Cent. Dig. § 232.*

[51] 136 U. S. 257, 10 Sup. Ct. 1034, 34 L. Ed. 514. *See "Criminal Law," Dec. Dig. (Key-No.) § 112; Cent. Dig. §§ 220–230.*

[52] 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377. *See "Criminal Law," Dec. Dig. (Key-No.) §§ 112, 113; Cent. Dig. §§ 220–232.*

[53] Penal Code, § 37 (U. S. Comp. St. Supp. 1911, p. 1600); Hyde v. U. S., 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114. *See "Criminal Law," Dec. Dig. (Key-No.) § 113; Cent. Dig. §§ 190, 232.*

[54] U. S. v. Dawson, 15 How. 467, 14 L. Ed. 775; Cook v. U. S., 138 U. S. 157, 11 Sup. Ct. 268, 34 L. Ed. 906. *See "Criminal Law," Dec. Dig. (Key-No.) § 97; Cent. Dig. §§ 177–191.*

[55] 19 Wall. 486, 22 L. Ed. 67. *See "Criminal Law," Dec. Dig. (Key-No.) § 97; Cent. Dig. §§ 177–191.*

high seas. The murderer was taken into the Southern District of New York, and turned over to the authorities there. The vessel containing him stopped five days at quarantine at the mouth of the lower harbor of New York City, which was in the Eastern District of New York. The Supreme Court held, in an opinion containing no discussion of the question, that he could be tried in the Southern District, where the officers had carried him.

Under sections 5570 and following [56] there are various regulations in relation to guano islands which have come under the jurisdiction of the United States. Section 272 of the Penal Code applies the provisions of the Code to these islands. In Jones v. U. S.[57] it was held that such offenses, under section 730, now section 41 of the Judicial Code, could be tried in the district where the offender was brought.

[56] U. S. Comp. St. 1901, p. 3739.

[57] 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691. *See "Criminal Law," Dec. Dig. (Key-No.) § 97; Cent. Dig. §§ 177–191.*

CHAPTER III

THE DISTRICT COURT (Continued)—CRIMINAL JURISDICTION AND PRACTICE (Continued)

20. Indictment.
21. Same—Form of Indictment.
22. Information.
23. Same—Form of Information.
24. The Defense.
25. The Trial and Its Incidents.

INDICTMENT

20. Indictment by a grand jury is the most formal mode of criminal procedure, and is required by law in all cases of capital or infamous offenses.

The general rules of criminal procedure and practice in the federal courts are based upon those of the common law, though the rigor and technicality of the common law have been much modified by statute.[1] The fourth, fifth, sixth, seventh, and eighth amendments to the Constitution are practically a bill of rights, and show the solicitude of our ancestors to protect the citizen in every way from unjust prosecutions. In fact, these amendments are practically parts of the original Constitution, for the only way in which some of the states were induced to adopt the Constitution in their state conventions was the assurance of its advocates that it should at once be amended by these additions.

The fifth amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of

[1] Howard v. U. S., 75 Fed. 986, 21 C. C. A. 586, 34 L. R. A. 509. *See "Courts," Dec. Dig. (Key-No.) § 337; Cent. Dig. § 908.*

a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger. This renders an indictment necessary in all cases of capital or infamous offenses. The question, what constitutes an infamous offense was long unsettled, but recent decisions of the Supreme Court have laid down as the test the punishment which can be inflicted. Any offense which may be punishable by confinement in a state prison or penitentiary for a term of years, either with or without hard labor, is an infamous offense, in the sense of this provision. The test is not the punishment that is actually inflicted in the special case, but the punishment that might be inflicted on the crime charged in the indictment, whether that punishment, as a matter of fact, is inflicted in the special case or not; and the Supreme Court in these cases has repudiated the test of infamous offenses based upon the question of its effect on the prisoner in regard to his competency as a witness thereafter, and applies simply the test as to the character of the punishment.[2] The question whether a given act is a felony or not did not affect the question whether the offense is infamous. If the punishment was as defined above, the offense was infamous, though only a misdemeanor; and, if not as defined above, it might not have been infamous, though a felony.

With these decisions in view, the committee, in drafting the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1088 [U. S. Comp. St. Supp. 1911, p. 1588]), provided by section 335 that all offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies; and all other offenses, misdemeanors.

The provisions as to hard labor were omitted because the

[2] Ex parte WILSON, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; Mackin v. U. S., 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909; In re Claasen, 140 U. S. 200, 11 Sup. Ct. 735, 35 L. Ed. 409. *See "Indictment and Information," Dec. Dig. (Key-No.) § 2; Cent. Dig. §§ 4–8.*

United States frequently use state prisons, whose discipline is controlled by the state, which may inflict hard labor.[3]

But section 338 of the Penal Code provides that the omission of the words "hard labor" shall not prevent the court from imposing it. This provision makes felonies and infamous offenses practically the same.

Independent of statute, a felony means those offenses punishable by forfeiture of lands or goods with capital or other punishment superadded.[4]

Under section 1021 of the Revised Statutes,[5] no indictment shall be found, nor shall any presentment be made, without the concurrence of at least twelve grand jurors. It is not, however, necessary for the indictment to show upon its face that it was found by twelve grand jurors.[6]

The Court to Try Indictments

Sections 1037, 1038 and 1039 of the Revised Statutes[7] provided for the transfer of cases from the circuit courts to the district courts of the same district for trial in certain cases, and vice versa. These sections are not specifically repealed by the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087 [U. S. Comp. St. Supp. 1911, p. 128]), but the grant of all criminal jurisdiction to the district court by section 24, paragraph 2, of that act, and the abolition of the circuit court by section 289, render the above sections obsolete. All criminal cases are now tried in the district court.

[3] In re Karstendick, 93 U. S. 396, 23 L. Ed. 889. *See "Indictment and Information," Dec. Dig. (Key-No.) § 2; Cent. Dig. §§ 4–8.*

[4] Bannon v. U. S., 156 U. S. 464, 15 Sup. Ct. 467, 39 L. Ed. 494. *See "Indictment and Information," Dec. Dig. (Key-No.) §§ 2, 3; Cent. Dig. §§ 4–23.*

[5] U. S. Comp. St. 1901, p. 719.

[6] U. S. v. Laws, 2 Low. 115, Fed. Cas. No. 15,579; Caha v. U. S., 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415. *See "Indictment and Information," Dec. Dig. (Key-No.) §§ 56, 57; Cent. Dig. §§ 175–179.*

[7] U. S. Comp. St. 1901, p. 723.

SAME—FORM OF INDICTMENT

21. An indictment in the federal courts, though defective in matter of form, is sufficient if the necessary facts of time, place, and circumstance are so stated as to enable the accused to concert his defense and protect himself from a second prosecution, and so as to enable the court to decide whether it is legally sufficient to support a conviction.

Section 1025, Rev. St. U. S.,[8] provides that no indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected, by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

Under this federal statute of jeofails, indictments in the federal courts are simple and devoid of archaic terms or cumbrous forms. At the same time they must be so definite as to give the accused notice of the crime charged against him, enable him to concert his defense, and enable him also to plead former acquittal or conviction in the event of a second trial for the same offense. The general requisites of an indictment are well defined in U. S. v. Cruikshank[9] as follows: "In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. 6. In United States v. Mills, 7 Pet. 142 [8 L. Ed. 636], this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused

[8] U. S. Comp. St. 1901, p. 720.

[9] 92 U. S. 542, 23 L. Ed. 588. *See "Indictment and Information," Dec. Dig. (Key-No.) § 71; Cent. Dig. §§ 193, 194.*

of the crime with which he stands charged'; and in United States v. Cook, 17 Wall. 174 [21 L. Ed. 538], that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars. 1 Archb. Cr. Pr. & Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances." In statutory offenses the language of the statute may be followed, but this does not dispense with the necessity of setting out the specific elements of the offense itself with sufficient definiteness to put the prisoner on his defense, and to enable him to protect himself from a second prosecution.[10] It must charge the time and place, though a blank as to the exact date is not always fatal, and naming the county instead of the town is at least not fatal on a motion in arrest of judgment.[11] As to offenses on the high seas, it is

[10] U. S. v. Fero (D. C.) 18 Fed. 901; U. S. v. Brazeau (C. C.) 78 Fed. 464; Peters v. U. S., 94 Fed. 127, 36 C. C. A. 105; Cochran v. U. S., 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704; Harper v. U. S., 170 Fed. 385, 95 C. C. A. 555; Hauger v. U. S., 173 Fed. 54, 97 C. C. A. 372; U. S. v. Raley (D. C.) 173 Fed. 159. *See "Indictment and Information," Dec. Dig. (Key-No.) § 110; Cent. Dig. §§ 289–194.*

[11] Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377; Id.,

not necessary to charge the special place where they happened, for the general allegation that they were on the high seas and out of the jurisdiction of any particular state is sufficient.[12]

In setting out a draft contained in a registered letter alleged to have been stolen, a description of it, giving the name of the maker, the payee, the payee's address, and the place where it is payable, with an allegation that further particulars are unknown to the grand jury, is sufficient; the draft having been destroyed.[13] The indictment must give the name, not the mere initials, of the accused; but, if the sound is the same, the fact that the spelling is incorrect does not vitiate it.[14] An indictment must set out a written document in hæc verba, though, as to certain matter made unmailable by the federal statutes, an allegation in the indictment that it is improper to be put upon the records of the court renders it discretionary with the court whether to require such matter to be set out in the indictment, and the exercise of such discretion is not reviewable; nor does a failure to require it to be set out infringe the prisoner's constitutional right to be informed of the nature and cause of the accusation.[15] The indorsement

163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300; Ledbetter v. U. S., 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162; U. S. v. Conrad (C. C.) 59 Fed. 458. *See "Indictment and Information," Dec. Dig. (Key-No.) §§ 86, 87; Cent. Dig. §§ 230–255.*

[12] ANDERSEN v. U. S., 170 U. S. 481, 18 Sup. Ct. 689, 42 L. Ed. 1116. *See "Indictment and Information," Dec. Dig. (Key-No.) § 86; Cent. Dig. §§ 230–243.*

[13] Rosencrans v. U. S., 165 U. S. 257, 17 Sup. Ct. 302, 41 L. Ed. 708. *See "Indictment and Information," Dec. Dig. (Key-No.) § 71; Cent. Dig. §§ 193, 194.*

[14] U. S. v. Upham (C. C.) 43 Fed. 68; Faust v. U. S., 163 U. S. 452, 16 Sup. Ct. 1112, 41 L. Ed. 224. *See "Indictment and Information," Dec. Dig. (Key-No.) § 81; Cent. Dig. §§ 216–224.*

[15] U. S. v. Noelke (C. C.) 1 Fed. 426; U. S. v. Watson (D. C.) 17 Fed. 145; Dunlop v. U. S., 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799; Rosen v. U. S., 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606. *See "Indictment and Information," Dec. Dig. (Key-No.) § 81; Cent. Dig. §§ 216–224.*

on the indictment of a reference to the statute on which the district attorney supposes it to be based is not a part of the indictment itself, and the indictment is good if sustainable under some other statute.[16]

Section 5396 of the Revised Statutes[17] makes special provision for an indictment charging perjury, and this special provision is not modified or done away with by section 1025 (U. S. Comp. St. 1901, p. 720).[18] Whether an indictment on a statute must negative an exception in the statute depends upon the form of the statute itself. If the exception is in the same clause as the offense, so interwoven as to be inseparable, the indictment should negative it; but, if it is in a separate clause, then the exception is matter of defense, and need not be negatived in the indictment.[19] So liberal is the practice under section 1025 that the omission of the usual phrase, "contrary to the statute in such case made and provided, and against the peace and dignity of the United States" is mere matter of form, and does not vitiate the indictment.[20]

Nor is it necessary to use the word "feloniously," when the statute itself does not use it.[21] The recital in the in-

[16] Williams v. U. S., 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509; Rogers v. U. S., 180 Fed. 54, 103 C. C. A. 408, 31 L. R. A. (N. S.) 264. *See "Indictment and Information," Dec. Dig. (Key-No.) § 54; Cent. Dig. §§ 138–143.*

[17] U. S. Comp. St. 1901, p. 3655.

[18] Markham v. U. S., 160 U. S. 319, 16 Sup. Ct. 288, 40 L. Ed. 441. *See "Indictment and Information," Dec. Dig. (Key-No.) § 111; Cent. Dig. §§ 295–298.*

[19] Shelp v. U. S., 81 Fed. 694, 26 C. C. A. 570; U. S. v. Wood (D. C.) 168 Fed. 438; U. S. v. Freed (C. C.) 179 Fed. 236. *See "Indictment and Information," Dec Dig. (Key-No.) § 111; Cent. Dig. §§ 295–298.*

[20] Frisbie v. U. S., 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657. *See "Indictment and Information," Dec. Dig. (Key-No.) § 82; Cent. Dig. §§ 122–131.*

[21] Bannon v. U. S., 156 U. S. 464, 15 Sup. Ct. 467, 39 L. Ed. 494. *See "Indictment and Information," Dec. Dig. (Key-No.) § 91; Cent. Dig. §§ 261–265; "Burglary," Cent. Dig. § 35; "Forgery," Cent. Dig. § 61.*

dictment that it was found upon the oaths of the grand jurors, when one of them affirmed, is also a mere matter of form.[22] An indictment need not set out regulations made by any of the departments under statutory authority, nor need they be offered in evidence, for the courts notice them judicially.[23] Charges or allegations in an indictment which are not necessary may be disregarded, but cannot be struck out. There is no such thing as amending an indictment. It is supposed to be the act of the grand jury, and it is not for the court to say what charges in it induced them to find it, and what not. An amendment by the court, even in striking out words which could be disregarded as surplusage, makes it no longer an indictment of a grand jury, makes it an absolute nullity, deprives the court of jurisdiction to try it, and entitles the prisoner to be released on habeas corpus.[24]

Each count of an indictment must charge but one distinct offense, but section 1024, Rev. St. U. S.,[25] provides that when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment, in separate counts; and, if two or more indictments are found, in such cases the court may order them to be consolidated.

Although each count must charge a distinct offense, a

[22] Bram v. U. S., 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568. *See "Indictment and Information," Dec. Dig. (Key-No.) § 30; Cent. Dig. § 120.*

[23] Wilkins v. U. S., 96 Fed. 837, 37 C. C. A. 588; Caha v. U. S., 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415. *See "Indictment and Information," Dec. Dig. (Key-No.) § 61; Cent. Dig. § 183.*

[24] Ex parte BAIN, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849; U. S. v. Linnier (C. C.) 125 Fed. 83, 87. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 30; Cent. Dig. § 25; "Indictment and Information," Dec. Dig. (Key-No.) § 159; Cent. Dig. §§ 505–514.*

[25] U. S. Comp. St. 1901, p. 720.

count for murder does not become liable to the charge of duplicity by reciting that the murder was committed by shooting and drowning.[26] A count may charge as a single offense a series of acts which constitute a single transaction, though these acts may become separate offenses as regards separate persons,[27] and it may be that two supposed offenses may be merely successive acts in one transaction.[28] A single count may charge one defendant as a principal, and another as accessory, and this does not make it liable to the charge of duplicity.[29]

Under this power of joinder, separate murders may be joined in one indictment under separate counts.[30] Felonies and misdemeanors may be joined also, and any offenses if of the same general class.[31] There is, however, a limit to this power of joinder. In McElroy v. U. S.[32] the Supreme Court held, in a case of indictments against three parties for assault with intent to kill one party, another indictment against the same parties for assault with intent to kill another party, another indictment against the same parties for arson of the dwelling house of one party, and

[26] ANDERSEN v. U. S., 170 U. S. 481, 18 Sup. Ct. 689, 42 L. Ed. 1116. *See "Indictment and Information," Dec. Dig. (Key-No.) § 125; Cent. Dig. §§ 334–400.*

[27] U. S. v. Scott (C. C.) 74 Fed. 213; U. S. v. Delaware, L. & W. R. Co. (C. C.) 152 Fed. 269, 273. *See "Indictment and Information," Dec. Dig. (Key-No.) § 125; Cent. Dig. §§ 334–400.*

[28] U. S. v. Fero (D. C.) 18 Fed. 901; U. S. v. Stone (D. C.) 49 Fed. 848. *See "Indictment and Information," Dec. Dig. (Key-No.) § 125; Cent. Dig. §§ 334–400.*

[29] U. S. v. Berry (D. C.) 96 Fed. 842. *See "Indictment and Information," Dec. Dig. (Key-No.) § 125; Cent. Dig. §§ 334–400.*

[30] Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208. *See "Indictment and Information," Dec. Dig. (Key-No.) § 130; Cent. Dig. §§ 419–423.*

[31] U. S. v. Spintz (C. C.) 18 Fed. 377; Williams v. U. S., 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509. *See "Indictment and Information," Dec. Dig. (Key-No.) § 131; Cent. Dig. § 424.*

[32] 164 U. S. 76, 17 Sup. Ct. 31, 41 L. Ed. 355. *See "Criminal Law," Dec. Dig. (Key-No.) § 619; Cent. Dig. § 1376; "Indictment and Information," Cent. Dig. § 402.*

another indictment against three of these parties for arson of the dwelling house of another party, that these could not be consolidated, and these different defendants arraigned together in an omnibus trial for these various offenses.

It is discretionary with the court to compel the government to elect on which of several indictments or counts it will proceed, and this may be done at any time during the trial; and the court will always do it if convinced that a trial upon too many indictments or counts would embarrass the defendant in his defense.[33]

A corporation and its officers may be joined in an indictment under the Elkins act for rebating, where the acts of the officers are criminally imputed to the corporation.[34]

It is allowable for the different counts to refer to each other.[35] The fact that one count is invalid, because based upon a complaint made on information only, does not invalidate other counts made upon a complaint based on personal knowledge.[36]

[33] Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; Pierce v. U. S., 160 U. S. 355, 16 Sup. Ct. 321, 40 L. Ed. 454; Gardes v. U. S., 87 Fed. 172, 30 C. C. A. 596; Id., 171 U. S. 689, 19 Sup. Ct. 884, 43 L. Ed. 1179. *See "Indictment and Information," Dec. Dig. (Key-No.) § 132; Cent. Dig. §§ 425–453.*

[34] New York Cent. & H. R. Co. v. U. S., 212 U. S. 481, 29 Sup. Ct. 304, 53 L. Ed. 613. *See "Indictment and Information," Dec. Dig. (Key-No.) § 124; Cent. Dig. §§ 327–333.*

[35] Blitz v. U. S., 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725; Crain v. U. S., 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097; U. S. v. Peters (C. C.) 87 Fed. 984; Peters v. U. S., 94 Fed. 127, 36 C. C. A. 105. *See "Indictment and Information," Dec. Dig. (Key-No.) § 99; Cent. Dig. §§ 270, 270½.*

[36] Rice v. Ames, 180 U. S. 371, 21 Sup. Ct. 406, 45 L. Ed. 577. *See "Indictment and Information," Dec. Dig. (Key-No.) § 100; Cent. Dig. § 271.*

INFORMATION

22. Information by the district attorney is a method of criminal procedure less formal than the indictment, and an information lies in any cases not capital or infamous.

SAME—FORM OF INFORMATION

23. Information must conform substantially to the rules stated above in relation to indictments.

The requisites of an indictment apply to informations. An information lies in any cases not capital or infamous, as above defined. Section 1022, Rev. St. U. S.,[37] which provides that all crimes and offenses committed against the provisions of chapter 7, tit. "Crimes" (this chapter defining offenses against the elective franchise), which are not infamous, may be prosecuted by indictment or by information filed by a district attorney, must be construed in conjunction with the fifth amendment of the Constitution, and was not intended to mean that only those special offenses could be proceeded against by information.[38] An information must be by leave of court, and the judge may give the accused an opportunity to show cause against its filing.[39] A complaint, to justify an information, must show personal knowledge and probable cause.[40]

[37] U. S. Comp. St. 1901, p. 720.

[38] In re WILSON, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89. *See "Indictment and Information," Dec. Dig. (Key-No.) §§ 2, 3; Cent. Dig. §§ 4–23.*

[39] U. S. v. Smith (C. C.) 40 Fed. 755. *See "Indictment and Information," Dec. Dig. (Key-No.) § 40; Cent. Dig. § 151.*

[40] Johnston v. U. S., 87 Fed. 187, 30 C. C. A. 612; U. S. v. Tureaud (C. C.) 20 Fed. 621. *See "Indictment and Information," Dec.*

THE DEFENSE

24. The method of defense is substantially the same as in the state courts, i. e. by motions to quash, demurrers, or pleas, dilatory or peremptory, according to the character of the defense.

Prisoner Entitled to Copy of Indictment and Lists of Jurors and Witnesses Before Trial

Section 1033 of the Revised Statutes [41] provides that, when any person is indicted of treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial. This requirement, as is obvious from its language, applies only to capital offenses. The prisoner must ask for it before pleading or the commencement of the trial, or he will be held to have waived it.[42] If a witness is offered whose name is not on the list furnished, the defendant must object at once, and not wait until the witness has been examined in chief, as such action also will be a waiver.[43]

Dig. (Key-No.) § 41; Cent. Dig. §§ 152–169; "Criminal Law," Cent. Dig. §§ 415–434, 460–477.

[41] U. S. Comp. St. 1901, p. 722.

[42] U. S. v. Cornell, Fed. Cas. No. 14,868; U. S. v. Curtis, Fed. Cas. No. 14,905. *See "Criminal Law," Dec. Dig. (Key-No.) § 628; Cent. Dig. §§ 1409–1419.*

[43] Hickory v. U. S., 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170. See, in general, Van Duzee v. U. S. (D. C.) 41 Fed. 571; U. S. v. Van Duzee, 140 U. S. 169, 11 Sup. Ct. 758, 35 L. Ed. 399; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429. *See "Criminal Law," Dec. Dig. (Key-No.) § 628; Cent. Dig. §§ 1409–1419.*

General Defenses

The method of defense in criminal cases in the federal courts is practically the same that prevails in the courts of the different states, and the general rules of criminal procedure are applicable. Dilatory defenses must be made first and promptly. Defenses of this sort are usually made either by motion to quash or by plea in abatement. A motion to quash may be made although dependent on facts not appearing on the face of the record, and evidence may be adduced on the hearing of the motion. In fact, the mere affidavit to a written motion to quash, setting out facts not admitted, and accompanied by no evidence, is not sufficient proof to sustain it. For instance, a motion to quash an indictment on the ground that negroes were improperly excluded from the jury was held to have been properly denied when the only proof of the fact alleged was the affidavit to the written motion.[44] A motion to quash is addressed to the discretion of the court, and therefore the action of the court upon it is not usually a ground of error.[45] An exception to the make-up of a grand jury may be made by a plea in abatement or by motion to quash, and, if it depends upon facts not shown by the record, evidence is admissible in support of it, but it must be made before pleading in bar.[46] A plea in abatement is also the proper way to raise questions of this character dependent on outside facts, but any objection to the composition of a grand jury must be offered at the earliest oppor-

[44] Smith v. Mississippi, 162 U. S. 592, 16 Sup. Ct. 900, 40 L. Ed. 1082. *See "Indictment and Information," Dec. Dig. (Key-No.) § 140; Cent. Dig. § 475.*

[45] Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; Durland v. U. S., 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709. *See "Criminal Law," Dec. Dig. (Key-No.) § 1149; Cent. Dig. §§ 3039–3043, 3058.*

[46] Carter v. Texas, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839; Burchett v. U. S., 194 Fed. 821, 114 C. C. A. 525. *See "Criminal Law," Dec. Dig. (Key-No.) § 279; Cent. Dig. §§ 643, 644; "Indictment and Information," Dec. Dig. (Key-No.) § 139; Cent. Dig. § 473.*

tunity; and the plea in abatement is too late, if the prisoner had any earlier opportunity in court to question the manner in which the grand jury was formed.[47]

A plea in abatement is waived by pleading in bar.[48]

Defenses of law going to the substance are raised by demurrer, but under section 1025, heretofore discussed, special demurrers to mere matters of form are practically superseded.[49] If a demurrer is overruled, the proper judgment is respondeat ouster.[50]

In Hillegass v. U. S.[51] it was held that when a demurrer is overruled and the accused is allowed to plead over, and does so, he cannot assign the ruling of the court on his demurrer as error, as pleading over is a waiver. The court must have had in mind demurrers in matters of form.

Under the act of March 2, 1907,[52] jurisdiction is conferred on the Supreme Court to review at the instance of the government certain rulings on demurrers involving the construction of statutes in criminal cases. This act is not mentioned in the repealing sections of either the Judicial or Penal Codes; so it is still in force.[53]

After dilatory defenses are disposed of, and the prisoner is arraigned, section 1032, Rev. St. U. S.,[54] provides that when any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer

[47] Agnew v. U. S., 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624. *See "Criminal Law," Dec. Dig. (Key-No.) § 279; Cent. Dig. §§ 643, 644.*

[48] U. S. v. Gale, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. Ed. 857. *See "Criminal Law," Dec. Dig. (Key-No.) § 279; Cent. Dig. §§ 643, 644.*

[49] U. S. v. Kilpatrick (D. C.) 16 Fed. 765. *See "Indictment and Information," Dec. Dig. (Key-No.) § 147; Cent. Dig. §§ 490–494.*

[50] Section 1026, Rev. St. U. S. (U. S. Comp. St. 1901, p. 720).

[51] 183 Fed. 199, 105 C. C. A. 631. *See "Indictment and Information," Dec. Dig. (Key-No.) § 197; Cent. Dig. § 636.*

[52] 34 Stat. 1246, c. 2564.

[53] U. S. v. Winslow, 227 U. S. 202, 33 Sup. Ct. 253, 57 L. Ed. ——. *See "Courts," Dec. Dig. (Key-No.) § 385.*

[54] U. S. Comp. St. 1901, p. 722.

thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto, and when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury. This section applies to informations as well as indictments.[55]

The record in a criminal case must show both an arraignment and a plea; otherwise there is no issue for the jury to try, and a verdict and judgment following would be fatally defective.[56] Nearly all defenses going to the merits may be made under a plea of not guilty, but there is one which, in its very nature, should be pleaded specially. Under amendment 5 of the Constitution, it is provided that no person shall be subject, for the same offense, to be twice put in jeopardy of life or limb. A defense of once in jeopardy, therefore, could hardly be proved under a plea of not guilty, for the prisoner might be actually guilty, and yet entitled to set up this defense. In some cases, in fact, such a plea might be interposed in conjunction with a plea of not guilty without its being inconsistent. For instance, in Thompson v. U. S.,[57] the judge discovered during the trial of the case that one of the members of the jury had been on the grand jury which found the indictment. He, thereupon, against the prisoner's objection, discharged the jury and continued the case over for a new trial. On the second trial the prisoner pleaded that the proceedings on the first trial entitled him to raise

[55] U. S. v. Borger (C. C.) 7 Fed. 193; In re Smith (C. C.) 13 Fed. 25. *See "Criminal Law," Dec. Dig. (Key-No.) § 266; Cent. Dig. §§ 619, 620.*

[56] Shelp v. U. S., 81 Fed. 694, 26 C. C. A. 570; Crain v. U. S., 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097; Johnson v. U. S., 225 U. S. 405, 32 Sup. Ct. 748, 56 L. Ed. 1142; Beck v. U. S., 145 Fed. 625, 76 C. C. A. 417. *See "Criminal Law," Dec. Dig. (Key-No.) §§ 261, 1086; Cent. Dig. §§ 612, 613, 2753, 2754.*

[57] 155 U. S. 271, 15 Sup. Ct. 73, 39 L. Ed. 146. *See "Criminal Law," Dec. Dig. (Key-No.) §§ 270, 291; Cent. Dig. §§ 624–628, 667.*

the defense of once in jeopardy. The Supreme Court held that this plea was not inconsistent with the plea of not guilty, under the circumstances of that special case; but it also held that the plea was not sustainable on the facts, in view of the power of federal courts to discharge juries for facts developed during the trial.

Plea of Former Jeopardy

The fifth amendment provides that no person shall be subject, for the same offense, to be twice put in jeopardy of life or limb. This constitutional provision has been the subject of some interesting decisions in the federal courts. The fact that a failure to testify in certain cases before Congress is punishable as a contempt does not make a statute void which also punishes it as a misdemeanor, on the ground of being twice in jeopardy, for the proceedings are entirely different in nature.[58] On the other hand, where a law authorizes a procedure in rem against property for violation of customs laws, and also a direct criminal proceeding against the owner of the property, the acquittal of the owner is a bar to a subsequent proceeding against the property.[59] The provision does not invalidate a law authorizing the infliction of a severer punishment for a second offense.[60] A party who appeals from a criminal decision against him, and secures its reversal, cannot on the new trial plead the former erroneous trial as placing him in jeopardy.[61] Where a party is indicted for murder

[58] In re Chapman, 166 U. S. 661, 17 Sup. Ct. 677, 41 L. Ed. 1154. *See "Criminal Law," Dec. Dig. (Key-No.) § 162; Cent. Dig. § 285.*

[59] Coffey v. U. S., 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684. *See "Judgment," Dec. Dig. (Key-No.) § 751; Cent. Dig. §§ 1309, 1310.*

[60] Moore v. Missouri, 159 U. S. 673, 16 Sup. Ct. 179, 40 L. Ed. 301; Graham v. West Virginia, 224 U. S. 616, 32 Sup. Ct. 583, 56 L. Ed. 917. *See "Criminal Law," Dec. Dig. (Key-No.) § 162; Cent. Dig. § 285.*

[61] Ball v. U. S., 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300; Murphy v. Massachusetts, 177 U. S. 155, 20 Sup. Ct. 639, 44 L. Ed. 711; Steinman v. U. S., 185 Fed. 47, 107 C. C. A. 151. *See "Criminal Law," Dec. Dig. (Key-No.) §§ 192, 193; Cent. Dig. §§ 376–378.*

on an indictment which, if objected to, would be fatally defective, and goes to trial on the merits, without excepting to the indictment, and is acquitted, he can plead once in jeopardy to a new proceeding by the government on a correct indictment.[62] Under the power of the federal courts, the act of a court in discharging a jury after finding that one of the jury had been on the grand jury that found the indictment—the discharge of the jury being against the protest of the prisoner—does not violate this provision, and the prisoner can be tried a second time.[63] Parol evidence is always admissible, and sometimes necessary, to prove the facts which are the basis of this plea.[64]

Sometimes the same acts constitute distinct offenses, in which case an acquittal on one does not bar a prosecution on the other.[65]

Some offenses are continuing in nature. In such case an acquittal does not bar a prosecution for subsequent acts.[66]

THE TRIAL AND ITS INCIDENTS

25. (a) EVIDENCE—The accused is entitled to be confronted with adverse witnesses, to compulsory process for his own, and to testify in his own behalf; but his failure to testify cannot be the subject of unfavorable presumptions or comments.

[62] Ball v. U. S., 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300. *See "Criminal Law," Dec. Dig. (Key-No.) § 186; Cent. Dig. §§ 312, 320, 345–361.*

[63] THOMPSON v. U. S., 155 U. S. 271, 15 Sup. Ct. 73, 39 L. Ed. 146. *See "Criminal Law," Dec. Dig. (Key-No.) § 182; Cent. Dig. §§ 330–332.*

[64] Durland v. U. S., 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709. *See "Criminal Law," Dec. Dig. (Key-No.) § 295; Cent. Dig. §§ 674–678.*

[65] Gavieres v. U. S., 220 U. S. 338, 31 Sup. Ct. 421, 55 L. Ed. 489. *See "Criminal Law," Dec. Dig. (Key-No.) § 195; Cent. Dig. §§ 382, 383.*

[66] U. S. v. Swift (D. C.) 186 Fed. 1002. *See "Criminal Law," Dec. Dig. (Key-No.) § 198; Cent. Dig. § 385.*

(b) INSTRUCTIONS AND EXCEPTIONS THERETO—Instructions from the court propound the law to the jury, and should be followed, though a verdict of acquittal in disregard of the principles laid down will stand. Errors in them prejudicial to the accused may be availed of by bill of exceptions.

(c) VERDICT AND SENTENCE—The proper method of setting aside a verdict and preventing sentence is by motion for new trial if the errors complained of are not of record, or motion in arrest of judgment if they are of record.

Evidence

The sixth amendment entitles the accused to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor. Under this provision, section 878, Rev. St. U. S.,[67] provides that whenever any person indicted in a court of the United States makes affidavit setting forth that there are witnesses whose evidence is material to his defense; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or within one hundred miles of the place of trial; and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses—the court in term, or any judge thereof in vacation, may order that such witnesses be subpœnaed if found within the limits aforesaid. In such case the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpœnaed in behalf of the United States.

This privilege of the prisoner to be confronted with the witnesses has been jealously guarded by the courts in

[67] U. S. Comp. St. 1901, p. 668.

criminal cases. For instance, in a proceeding against the receiver of stolen stamps, the record of the conviction of the thief was held not admissible in evidence against the receiver of the stamps for the purpose of showing that the ownership of the stamps was in the United States, as such record would have deprived the prisoner of the right of confronting witnesses on an essential element of the offense.[68] For the same reason, the testimony of one of the government's witnesses who had gone before the commissioner at the preliminary hearing could not be proved against the prisoner; it appearing that the witness had escaped, and that the defendant had not in any way participated in or connived at his escape.[69] If, however, the prisoner himself is responsible for the witness' absence, the testimony could be proved against him.[70] The constitutional provision, however, does not apply to witnesses introduced by the government in rebuttal, as, from the very nature of the case, it could not have been intended to apply to such a case.[71] It does not apply to a civil suit for the value of property forfeited under a federal law, as such procedure is not in its nature a criminal prosecution.[72] It does not forbid the reception in evidence of dying declarations, if they measure up to the requirements prescribed by the common law, and they are admissible both for and against the accused.[73]

[68] Kirby v. U. S., 174 U. S. 47, 19 Sup. Ct. 574, 43 L. Ed. 809. *See "Criminal Law," Dec. Dig. (Key-No.) § 662; Cent. Dig. §§ 1538–1548.*

[69] MOTES v. U. S., 178 U. S. 458, 20 Sup. Ct. 993, 44 L. Ed. 1150. *See "Criminal Law," Dec. Dig. (Key-No.) § 662; Cent. Dig. §§ 1538–1548.*

[70] Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244. *See "Criminal Law," Dec. Dig. (Key-No.) § 662; Cent. Dig. §§ 1538–1548.*

[71] Goldsby v. U. S., 160 U. S. 70, 16 Sup. Ct. 216, 40 L. Ed. 343. *See "Criminal Law," Dec. Dig. (Key-No.) § 662; Cent. Dig. §§ 1538–1548.*

[72] U. S. v. Zucker, 161 U. S. 475, 16 Sup. Ct. 641, 40 L. Ed. 777. *See "Criminal Law," Dec. Dig. (Key-No.) § 662; Cent. Dig. §§ 1538–1548.*

[73] Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917; Carver v. U. S., 160 U. S. 553, 16 Sup. Ct. 388, 40 L. Ed. 532; Id.,

Another constitutional provision which is rigidly guarded is contained in the fifth amendment, which provides that no person shall be compelled in any criminal case to be a witness against himself. Under this the courts have held that the confessions of the accused cannot be used against him unless it is clear that they are entirely voluntary, and that they have been made without any inducement held out to the prisoner, or any improper influences brought to bear upon him; though the mere fact that they are made while in custody is not in itself sufficient to prevent them from being voluntary.[74]

Under the decisions of the Supreme Court, there is a strong presumption of innocence, and the prisoner must be guilty beyond a reasonable doubt. Even the ordinary presumption of sanity does not negative this, but the burden is on the government to prove the crime beyond a reasonable doubt, and the capacity of the prisoner to commit crime is part of the elements of the crime.[75] The general good character of the prisoner is always admissible, and may be considered as itself sufficient to raise a reasonable doubt, though the rest of the evidence, taken alone, would not have left room for such a doubt.[76] The flight of the prisoner, or concealment of suspicious circumstances, is valuable as part of the chain of evidence, but is not sufficient alone to raise a legal presumption of guilt.[77]

164 U. S. 694, 17 Sup. Ct. 228, 41 L. Ed. 602. *See "Homicide," Dec. Dig. (Key-No.) § 200; Cent. Dig. §§ 425–427.*

[74] Pierce v. U. S., 160 U. S. 355, 16 Sup. Ct. 321, 40 L. Ed. 454; Bram v. U. S., 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568; Shaw v. U. S., 180 Fed. 348, 103 C. C. A. 494. *See "Criminal Law," Dec. Dig. (Key-No.) § 519; Cent. Dig. §§ 1163–1174.*

[75] Davis v. U. S., 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499; Matheson v. U. S., 227 U. S. 540, 33 Sup. Ct. 355, 57 L. Ed. ——. *See "Criminal Law," Dec. Dig. (Key-No.) §§ 311, 331; Cent. Dig. §§ 742–744.*

[76] Edgington v. U. S., 164 U. S. 361, 17 Sup. Ct. 72, 41 L. Ed. 467; Searway v. U. S., 184 Fed. 716, 107 C. C. A. 635. *See "Criminal Law," Dec. Dig. (Key-No.) §§ 376, 381; Cent. Dig. §§ 836–846.*

[77] Hickory v. U. S., 160 U. S. 408, 16 Sup. Ct. 327, 40 L. Ed. 474;

Where several are indicted jointly for a conspiracy or a joint crime, the acts and statements of the different defendants are evidence against each other, up to the point when the offense is consummated, or the idea of committing the offense abandoned, but not thereafter.[78]

Prisoner May, but Need Not, Testify

By the act of March 16, 1878,[79] it is provided that in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, territorial courts, and courts-martial, and courts of inquiry, in any state or territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him. The court is extremely careful, under this statute, to forbid any comments whatever upon the failure of the accused to testify. In fact, in one case the Supreme Court said that all reference to his failure to testify must be rigidly excluded.[80] When the prisoner does take the witness stand, his testimony is entitled to be considered fairly; and the judge must not make hostile comments upon the fact that he is the accused, or say to the jury that such fact alone should destroy or seriously impair the weight of his testimony,

Alberty v. U. S., 162 U. S. 499, 16 Sup. Ct. 864, 40 L. Ed. 1051; Starr v. U. S., 164 U. S. 627, 17 Sup. Ct. 223, 41 L. Ed. 577. *See "Criminal Law," Dec. Dig. (Key-No.) § 551; Cent. Dig. § 737.*

[78] Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; Brown v. U. S., 150 U. S. 93, 14 Sup. Ct. 37, 37 L. Ed. 1010; St. Clair v. U. S., 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936; Wiborg v. U. S., 163 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; Fitzpatrick v. U. S., 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078; Steers v. U. S., 192 Fed. 1, 112 C. C. A. 423. *See "Criminal Law," Dec. Dig. (Key-No.) §§ 422, 424; Cent. Dig. §§ 984–988, 1002–1010.*

[79] U. S. Comp. St. 1901, p. 660.

[80] WILSON v. U. S., 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650. *See "Criminal Law," Dec. Dig. (Key-No.) § 721; Cent. Dig. § 1672.*

though it can call the attention of the jury to the fact that the prisoner would have a strong motive to testify in his own interest. How far the court can go in this particular is difficult to define.[81] If a prisoner waives his right of exemption from testifying, and takes the witness stand, he takes it cum onere, and subjects himself to cross-examination, like any other witness.[82]

This protection applies simply to statements improperly extorted from the accused. It does not apply to evidence obtained from an examination of his person, or to evidence from his private papers, though improperly obtained.[83]

The fact that a decoy is used to establish the guilt of a prisoner is not sufficient to exclude evidence of such decoy, and the prisoner may be convicted upon it.[84]

The accused must be present during the trial, and this is a right which he cannot waive.[85] This, however, applies only to the court of original jurisdiction. When an appellate court affirms the action of the lower court, and enters an order to that effect, it is not necessary for the accused to be present, though the order of the appellate

[81] Hicks v. U. S., 150 U. S. 442, 14 Sup. Ct. 144, 37 L. Ed. 1137; Reagan v. U. S., 157 U. S. 301, 15 Sup. Ct. 610, 39 L. Ed. 709; Hickory v. U. S., 160 U. S. 408, 16 Sup. Ct. 327, 40 L. Ed. 474; Allison v. U. S., 160 U. S. 203, 16 Sup. Ct. 252, 40 L. Ed. 395. *See "Criminal Law," Dec. Dig. (Key-No.) §§ 743, 786; Cent. Dig. §§ 1722, 1895–1901.*

[82] Fitzpatrick v. U. S., 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078; Sawyer v. U. S., 202 U. S. 150, 26 Sup. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269. *See "Witnesses," Dec. Dig. (Key-No.) § 277; Cent. Dig. §§ 925, 979–984.*

[83] Holt v. U. S., 218 U. S. 245, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138; Ripper v. U. S., 178 Fed. 24, 101 C. C. A. 152; Id., 179 Fed. 497, 103 C. C. A. 478. *See "Criminal Law," Dec. Dig. (Key-No.) §§ 393–395; Cent. Dig. §§ 871–877.*

[84] Andrews v. U. S., 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023; Price v. U. S., 165 U. S. 311, 17 Sup. Ct. 366, 41 L. Ed. 727. *See "Criminal Law," Dec. Dig. (Key-No.) § 37; Cent. Dig. § 42; "Burglary," Cent. Dig. § 23; "Post Office," Dec. Dig. (Key-No.) § 42; Cent. Dig. §§ 52, 61.*

[85] Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262. *See "Criminal Law," Dec. Dig. (Key-No.) § 636; Cent. Dig. §§ 1465–1482.*

court names the time and place of execution, as that is not technically a part of the judgment.[86]

The granting or refusing of a continuance is a matter of discretion in the trial court, and not reviewable.[87]

It is the duty of the court to curb any improper or unfair remarks of counsel during the progress of a criminal trial. For instance, in Hall v. U. S.,[88] the prosecuting attorney, in commenting upon the fact which had come out in reference to the character of the prisoner during the trial—that he had been tried for killing a negro in Mississippi and acquitted—remarked that trials in the state of Mississippi of a white man for killing a negro were farces. The defendant excepted to these remarks, and the Supreme Court held that they were improper, and awarded him a new trial on that ground.

So, in Williams v. U. S.,[89] where the defendant was being tried for accepting bribes to admit Chinese into this country, the prosecuting attorney, in answer to the point made by the defendant that more had been sent back during his tenure of office than before or since, remarked that, no doubt, every Chinese woman who did not pay Williams was sent back. Exception was taken to this statement and overruled, and the Supreme Court granted a new trial on that, among other grounds.

The proper method of taking advantage of such points as this is by a bill of exceptions setting out the necessary

[86] Schwab v. Berggren, 143 U. S. 442, 12 Sup. Ct. 525, 36 L. Ed. 218. *See "Criminal Law," Dec. Dig. (Key-No.) § 987; Cent. Dig. §§ 2511, 2531.*

[87] Isaacs v. U. S., 159 U. S. 487, 16 Sup. Ct. 51, 40 L. Ed. 229; Fidelity & Deposit Co. v. L. Bucki & Son Lumber Co., 189 U. S. 135, 23 Sup. Ct. 582, 47 L. Ed. 744. *See "Criminal Law," Dec. Dig. (Key-No.) § 1151; Cent. Dig. §§ 3045–3049.*

[88] 150 U. S. 76, 14 Sup. Ct. 22, 37 L. Ed. 1003. Compare Sawyer v. U. S., 202 U. S. 150, 26 Sup. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269. *See "Criminal Law," Dec. Dig. (Key-No.) § 722½; Cent. Dig. § 1675.*

[89] 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509. *See "Criminal Law," Dec. Dig. (Key-No.) §§ 722, 726; Cent. Dig. §§ 1674, 1681.*

facts to show its relevancy and the ruling of the court thereon.[90]

Instructions to the Jury

In criminal cases the jury should take the law from the court, and should follow its instructions. They are not judges of both law and fact under the federal practice, but if they disregard the instructions, and bring in a verdict of acquittal in the teeth of the instructions, the government has no remedy. Despite this result, if they choose to disregard their duty, it is none the less their duty to take the law from the court, though in a criminal case the court cannot peremptorily instruct the jury to bring in a verdict of guilty.[91] In the federal practice the judge can express his opinion on questions of fact, but in such case he must caution the jury that his opinion is not binding upon them, and that they are sole judges of the fact.[92] He must not, however, comment in an argumentative or passionate way upon the facts in such manner as to prejudice the jury against the prisoner or interfere too eagerly in the conduct of the case;[93] and it is error in him to comment on the witnesses called to prove the defendant's character, and to tell the jury to disregard their evidence, on the ground that they themselves are lacking in character, for the jury is just as much judge of the credibility of witnesses on the subject of character as on any other sub-

[90] WILSON v. U. S., 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650. *See "Criminal Law," Dec. Dig. (Key-No.) § 1090; Cent. Dig. § 2819.*

[91] SPARF v. U. S., 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343. *See "Criminal Law," Dec. Dig. (Key-No.) § 753; Cent. Dig. §§ 1713, 1727–1730.*

[92] Simmons v. U. S., 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968. *See "Criminal Law," Dec. Dig. (Key-No.) § 762; Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769.*

[93] Starr v. U. S., 153 U. S. 614, 14 Sup. Ct. 919, 38 L. Ed. 841; Rudd v. U. S., 173 Fed. 912, 97 C. C. A. 462; Adler v. U. S., 182 Fed. 464, 104 C. C. A. 608. *See "Criminal Law," Dec. Dig. (Key-No.) § 656; Cent. Dig. §§ 1524–1533.*

ject.[94] The prisoner must be proved guilty beyond a reasonable doubt, and it is for the court to instruct the jury what constitutes a reasonable doubt, though it is difficult to define it as an abstract proposition.[95] If the prisoner wishes the jury to be instructed on any proposition of law, he must ask the instruction of the court. It is not error in the court, if it does not instruct on all propositions of law that may be involved, when it has not been asked to do so.[96] If, however, the legal proposition which the prisoner wishes to be propounded to the jury is covered by another instruction, or by the general charge which the court gives, it is not error in the court to refuse to repeat it.[97]

Error

The proper method of embodying in the record any errors in the court in reference to the instructions is by a bill of exceptions. In fact, this is probably the most common use of a bill of exceptions. Section 953 of the Revised Statutes,[98] as last amended, provides "that a bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which

[94] Smith v. U. S., 161 U. S. 85, 16 Sup. Ct. 483, 40 L. Ed. 626. *See "Criminal Law," Dec. Dig. (Key-No.) § 742; Cent. Dig. §§ 1138, 1719–1721.*

[95] Hopt v. Utah, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708; Dunbar v. U. S., 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390. *See "Criminal Law," Dec. Dig. (Key-No.) § 789; Cent. Dig. §§ 1846–1849, 1904–1922, 1960, 1967.*

[96] Goldsby v. U. S., 160 U. S. 70, 16 Sup. Ct. 216, 40 L. Ed. 343. *See "Criminal Law," Dec. Dig. (Key-No.) § 824; Cent. Dig. §§ 1996–2004.*

[97] Coffin v. U. S., 162 U. S. 664, 16 Sup. Ct. 943, 40 L. Ed. 1109; White v. U. S., 164 U. S. 100, 17 Sup. Ct. 38, 41 L. Ed. 365; Humes v. U. S., 170 U. S. 210, 18 Sup. Ct. 602, 42 L. Ed. 1011; U. S. v. Holt (C. C.) 168 Fed. 141; Holt v. U. S., 218 U. S. 245, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138. *See "Criminal Law," Dec. Dig. (Key-No.) § 829; Cent. Dig. 2011.*

[98] U. S. Comp. St. 1901, p. 696; Guardian Assur. Co. of London v. Quintana, 227 U. S. 100, 33 Sup. Ct. 236, 57 L. Ed. ——. *See "Criminal Law," Dec. Dig. (Key-No.) § 1090; Cent. Dig. § 2818.*

the cause was tried, or by the presiding judge thereof if more than one judge sat at the trial of the cause, without any seal of the court or judge annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter be tried is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions, then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions; and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case said judge is satisfied that, owing to the fact that he did not preside at the trial, or for any other cause, that he cannot fairly pass upon said motion, and allow and sign said bill of exceptions, then he may, in his discretion, grant a new trial to the party moving therefor."

An exception to an instruction or to a charge must point out definitely the part excepted to, as it is not the duty of the court to search through a long charge or instruction for error.[99] If the defendant asks a number of instructions which are refused, a general exception to their refusal fails if any one of them is wrong. He must specify the separate errors in connection with each instruction.[1]

[99] Edgington v. U. S., 164 U. S. 361, 17 Sup. Ct. 72, 41 L. Ed. 467; Richards v. U. S., 175 Fed. 911, 99 C. C. A. 401. *See "Criminal Law," Dec. Dig. (Key-No.) § 1059; Cent. Dig. § 2671.*

[1] Thiede v. Utah, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. Ed. 237. *See "Criminal Law," Dec. Dig. (Key-No.) § 1059; Cent. Dig. § 2671.*

A bill of exceptions to the refusal of the court to grant the instructions asked by the defendant should set out the instructions actually given; for, as the presumptions are in favor of the correctness of proceedings in the lower court, the appellate court might otherwise presume that the instructions actually given covered the points embodied in the instructions of the accused.[2] The instructions must be incorporated in the bill of exceptions so as to enable the appellate court to see wherein there was error.[3] It is allowable in federal practice to join all of the exceptions in one bill, but this does not dispense with the necessity of taking separate exceptions to the separate rulings and pointing out the separate errors relied on.[4]

The bill of exceptions need not state that it contains all the evidence, if the fact otherwise appears.[5]

The Verdict

It is allowable for the judge to recall the jury and give them further instructions, and even to impress on them the importance of coming to an agreement, and of making mutual concessions for that purpose.[6] When there is more than one count in an indictment, the jury may agree to bring in a verdict on one or more counts, though they dis-

[2] Andrews v. U. S., 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023, *See "Criminal Law," Dec. Dig. (Key-No.) § 1091; Cent. Dig. §§ 2818, 2940–2945.*

[3] Clune v. U. S., 159 U. S. 590, 16 Sup. Ct. 125, 40 L. Ed. 269. *See "Criminal Law," Dec. Dig. (Key-No.) §§ 1091, 1122; Cent. Dig. §§ 2818, 2940–2945.*

[4] LEES v. U. S., 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150; Richardson v. U. S., 181 Fed. 1, 104 C. C. A. 69. *See "Criminal Law," Dec. Dig. (Key-No.) §§ 1091, 1122; Cent. Dig. §§ 2818, 2940–2945.*

[5] Clyatt v. U. S., 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726. *See "Criminal Law," Dec. Dig. (Key-No.) § 1122; Cent. Dig. §§ 2940–2945.*

[6] Allis v. U. S., 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91; Allen v. U. S., 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528. Compare Burton v. U. S., 196 U. S. 283, 25 Sup. Ct. 243, 49 L. Ed. 482. *See "Criminal Law," Dec. Dig. (Key-No.) § 863; Cent. Dig. §§ 2065–2067.*

agree as to others, and where there are separate defendants they may acquit some and convict others; and, even when the case goes to the appellate court, the court may set aside the verdict as to one count, and let it stand as to others.[7] A verdict finding the defendant guilty on some counts, and not mentioning the other counts at all, is an acquittal on the other counts.[8] A general verdict of guilty is valid if any count is good, and convicts on all the counts.[9] Section 1035, Rev. St. U. S.,[10] provides that in all criminal cases the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged, provided that such attempt be itself a separate offense. Under this section it is proper for the court to instruct the jury that it should not find the prisoner guilty of a lesser offense where there is no evidence whatever to show that the lesser offense was actually committed,[11] but, if there is any evidence at all that a lesser offense was committed, the court must not take this question from the jury, and must not instruct them against finding a verdict of the lesser offense.[12] The jury may, by

[7] St. Clair v. U. S., 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936; Bucklin v. U. S., 159 U. S. 680, 16 Sup. Ct. 182, 40 L. Ed. 304; Ballew v. U. S., 160 U. S. 187, 16 Sup. Ct. 263, 40 L. Ed. 388; Selvester v. U. S., 170 U. S. 262, 18 Sup. Ct. 580, 42 L. Ed. 1029. *See "Criminal Law," Dec. Dig. (Key-No.) § 878; Cent. Dig. §§ 2098–2101.*

[8] Jolly v. U. S., 170 U. S. 402, 18 Sup. Ct. 624, 42 L. Ed. 1085. *See "Criminal Law," Dec. Dig. (Key-No.) § 878; Cent. Dig. §§ 2098–2101.*

[9] Friedenstein v. U. S., 125 U. S. 224, 8 Sup. Ct. 838, 31 L. Ed. 736; Dunbar v. U. S., 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390; Kaye v. U. S., 177 Fed. 147, 100 C. C. A. 567. *See "Criminal Law," Dec. Dig. (Key-No.) § 878; Cent. Dig. §§ 2098–2101.*

[10] U. S. Comp. St. 1901, p. 723.

[11] SPARF v. U. S., 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343. *See "Criminal Law," Dec. Dig. (Key-No.) § 795; Cent. Dig. §§ 1923–1927.*

[12] Stevenson v. U. S., 162 U. S. 313, 16 Sup. Ct. 839, 40 L. Ed. 980. *See "Criminal Law," Dec. Dig. (Key-No.) § 748; Cent. Dig. §§ 1923–1927.*

consent of parties and in the presence of the defendant, bring in a sealed verdict.[13]

New Trials

A motion for a new trial is addressed to the discretion of the federal court, and is not ordinarily reviewable, though, where the acts to which exceptions have been taken can only be availed of by granting the accused a new trial, and those acts are properly excepted to, the fact that the question comes up in the form of a motion for a new trial will not prevent the appellate court from relieving the accused against the errors so committed.[14]

Motions in Arrest of Judgment

This motion only lies for matter apparent on the record, or for the lack of matter that ought to be apparent on the record. For mere matters of form, the court will not sustain such a motion—even for points which in some cases might have been good on demurrer.[15]

Judgment and Sentence

The judgment should be definite, and show that it is based upon the verdict and the criminal statute under which the prosecution is instituted, though any defect in this particular may be supplied by the full record, if that itself is complete, showing an indictment, arraignment, plea, trial, and conviction.[16] It must conform strictly to the statute, and, if it goes on and adds a character of im-

[13] Pounds v. U. S., 171 U. S. 35, 18 Sup. Ct. 729, 43 L. Ed. 62. *See "Criminal Law," Dec. Dig. (Key-No.) § 873; Cent. Dig. § 2084.*

[14] Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917. *See "Criminal Law," Dec. Dig. (Key-No.) § 1156; Cent. Dig. §§ 3067–3071.*

[15] U. S. v. Barnhart (U. S.) 17 Fed. 579; Durland v. U. S., 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; Connors v. U. S., 158 U. S. 408, 15 Sup. Ct. 951, 39 L. Ed. 1033; Ledbetter v. U. S., 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162; Morris v. U. S., 168 Fed. 682, 94 C. C. A. 168; Floren v. U. S., 186 Fed. 961, 108 C. C. A. 159. *See "Criminal Law," Dec. Dig. (Key-No.) § 974; Cent. Dig. §§ 2469–2478.*

[16] White v. U. S., 164 U. S. 100, 17 Sup. Ct. 38, 41 L. Ed. 365; Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208. *See "Criminal Law," Dec. Dig. (Key-No.) § 995; Cent. Dig. §§ 2518–2543.*

prisonment not authorized by law, it is void—as, for example, where a judgment sentenced a person accused of crime to imprisonment for one year and the payment of a fine, and then illegally added that the imprisonment should take place in a state penitentiary, the judgment was void, and the prisoner was released on habeas corpus.[17] When a writ of error is taken to a judgment, it is merely stayed, not vacated.[18] Where a prisoner is convicted on several offenses, the court can impose a single sentence, making it greater than it would have been on any one.[19] Section 330 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [U. S. Comp. St. Supp. 1911, p. 1686]) permits the jury in certain capital cases to qualify their verdict by adding thereto, "Without capital punishment," and in such case the court cannot sentence to death. This statute has been construed to give the jury power to add this qualifying clause in any capital case, though there is no evidence whatever of palliating circumstances, and the court must not take this right away from them by instructions.[20]

[17] In re Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149. *See "Criminal Law," Dec. Dig. (Key-No.) § 995; Cent. Dig. §§ 2518–2543.*

[18] Schwab v. Berggren, 143 U. S. 442, 12 Sup. Ct. 525, 36 L. Ed. 218. *See "Criminal Law," Dec. Dig. (Key-No.) § 1084; Cent. Dig. §§ 2728–2735.*

[19] In re De Bara, 179 U. S. 316, 21 Sup. Ct. 110, 45 L. Ed. 207. *See "Criminal Law," Dec. Dig. (Key-No.) § 991; Cent. Dig. §§ 2518, 2525, 2528.*

[20] Winston v. U. S., 172 U. S. 303, 19 Sup. Ct. 212, 43 L. Ed. 456. See, also, on this same statute, MOTES v. U. S., 178 U. S. 458, 20 Sup. Ct. 993, 44 L. Ed. 1150. *See "Criminal Law," Dec. Dig. (Key-No.) § 884; Cent. Dig. § 2107.*

CHAPTER IV

THE DISTRICT COURT (Continued)—MISCELLANEOUS JURISDICTION

26. Penalties, Forfeitures, and Seizures.
27. Same—Nature and Form.
28. Admiralty.
29. Same—Nature and Form.
30. Particular Classes of Litigation, Including Questions under the Laws Relating to the Slave Trade, the Revenue, Domestic and Foreign, the Postal Laws, the Patent, Copyright, and Trade-Mark Laws, the Interstate Commerce Laws, Questions on Debentures, the Civil Rights Laws, the National Bank Laws, Suits by Aliens for Torts and Suits against Consuls.

PENALTIES, FORFEITURES, AND SEIZURES

26. The district court has jurisdiction of all suits for penalties and forfeitures incurred under any law of the United States, and of all seizures on land and on waters not within the admiralty and maritime jurisdiction.

The ninth clause of section 24 of the Judicial Code gives the district court jurisdiction "of all suits for penalties and forfeitures incurred under any law of the United States," and the third clause of the same section gives it jurisdiction of all seizures on land and on waters not within admiralty and maritime jurisdiction.

SAME—NATURE AND FORM

27. These proceedings are against the offender or against the property or both. Suits for penalties are in the form of an ordinary common-law action on a money demand. Suits for forfeitures against the

property are in the form of an information in rem. They partake both of a civil and a criminal nature, possessing certain attributes of each.

Penalties and forfeitures are common all through the federal statutes, in connection with the navigation laws, the customs laws, the internal revenue laws, etc. They usually prescribe a penalty against the offender, and, where the offense is sufficiently grave, a forfeiture of the property engaged in the violation of law. In some of the statutes, the property itself is treated as the offender, independent of the question of ownership. In such case the procedure against the property as an offending thing is independent of the procedure against the owner. In fact, it is possible for the owner to be acquitted and the property condemned in such case. Other proceedings make the act of the owner and the forfeiture of the property so interwoven that the one is an incident of the other. The special statute must be referred to in each case, to ascertain whether the case falls under one or the other of these classes. Under the first of these two clauses "suits for penalties and forfeitures" mean civil actions.[1] Under section 42 of the Judicial Code all pecuniary penalties and forfeitures may be sued for and recovered, either in the district where they accrue, or in the district where the offender is found; and, under section 45, proceedings on seizures, for forfeiture under any law of the United States, made on the high seas, may be prosecuted in any district into which the property so seized is brought, and proceedings instituted. Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made, except in cases where it is otherwise provided.

[1] The Little Ann, Fed. Cas. No. 8,397; U. S. v. Mann, Fed. Cas. No. 15,718. *See "Courts," Dec. Dig. (Key-No.) § 284; Cent. Dig. §§ 820–831; "War," Dec. Dig. (Key-No.) § 2; Cent. Dig. § 7.*

Suits for penalties are in the form of an ordinary common-law action on a money demand. Suits for forfeitures against the property are in the form of an information in rem. These procedures partake both of a civil and a criminal nature. Where no fine or imprisonment is imposed,[2] they are civil in their form—so much so, indeed, that the government has an appeal. But they are so far criminal in their nature that a defendant cannot be required to give evidence against himself.[3] On the other hand, in a civil action sounding in dollars and cents, the evidence can be taken by deposition, and the constitutional provision in reference to confronting the accused with witnesses does not prevent its being so taken.[4] Where the act of the owner is so connected with the illegal use of the property as to make it an essential element of the offense, his acquittal would bar a procedure in rem against the property.[5] These cases are triable by a jury, but the parties may waive a jury.[6] Where the violation of law by the thing itself is independent of the act of the owner, the procedure against the thing and the prosecution of the owner are distinct, and a forfeiture of the thing may be decreed

[2] Hepner v. U. S., 213 U. S. 103, 29 Sup. Ct. 475, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739, 16 Ann. Cas. 960; Chicago, B. & Q. R. Co. v. U. S., 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582. They are so far civil that a recovery may be had on a preponderance of evidence. New York C. & H. R. R. Co. v. U. S., 165 Fed. 833, 91 C. C. A. 519. *See "Aliens," Dec. Dig. (Key-No.) § 58; "Penalties," Dec. Dig. (Key-No.) § 16; Cent. Dig. §§ 13–16.*

[3] LEES v. U. S., 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150. *See "Courts," Dec. Dig. (Key-No.) § 414; Cent. Dig. § 1109; "Witnesses," Dec. Dig. (Key-No.) § 300; Cent. Dig. §§ 1242, 1242½.*

[4] U. S. v. Zucker, 161 U. S. 475, 16 Sup. Ct. 641, 40 L. Ed. 777. *See "Criminal Law," Dec. Dig. (Key-No.) § 662; Cent. Dig. §§ 3, 1538–1548.*

[5] Chantangco v. Abaroa, 218 U. S. 476, 31 Sup. Ct. 34, 54 L. Ed. 1116. *See "Judgment," Dec. Dig. (Key-No.) § 559; Cent. Dig. §§ 1077, 1078.*

[6] Henderson's Distilled Spirits, 14 Wall. 44, 20 L. Ed. 815. *See "Jury," Dec. Dig. (Key-No.) §§ 28, 29; Cent. Dig. §§ 176–203.*

without a conviction of the owner.[7] The procedure, on a libel of information, which is by nature largely an admiralty proceeding, or at least based on the practice of the admiralty court, is required by admiralty rule 22 of the Supreme Court to state the place of seizure, whether on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought, and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and give notice to all persons concerned in interest to appear and show cause at the return day of the process why the forfeiture should not be decreed. By section 923 of the Revised Statutes,[8] in such cases fourteen days' notice of the seizure and libel shall be given by causing the substance of the libel, with the order of the court thereon, setting forth the time and place appointed for trial, to be inserted in some newspaper published near the place of seizure, and by posting up the same in the most public manner, for the space of fourteen days, at or near the place of trial, and proclamation shall be made in such manner as the court shall direct; and, if no person appears and claims the property or bonds it, the court can proceed to hear and determine the cause according to law.

By section 1047 of the United States Revised Statutes,[9] suits for penalties or forfeitures are limited to five years, except where there are special provisions in special cases.

Statutory forfeitures, unlike common-law forfeitures,

[7] U. S. v. The Three Friends, 166 U. S. 1, 17 Sup. Ct. 495, 41 L. Ed. 897. *See "Neutrality Laws," Dec. Dig. (Key-No.)* § 4.

[8] U. S. Comp. St. 1901, p. 686.

[9] U. S. Comp. St. 1901, p. 727.

take effect, not from the date of sentence, but from the commission of the offense, even as against an innocent purchaser.[10]

The draft of the Judicial Code submitted by the Revision Committee shows that this ninth clause of section 24 of the Code (U. S. Comp. St. Supp. 1911, p. 135) was intended to include the special provision embodied in paragraph 6 of section 563 of the Revised Statutes (U. S. Comp. St. Supp. 1911, p. 455), conferring jurisdiction on the district court of suits under section 3490 of the Revised Statutes [11] against persons making false claims against the United States.[12]

Powers of Secretary of Treasury

Under sections 5293 and 5294 of the Revised Statutes,[13] the Secretary of the Treasury is given a large discretion in remitting penalties incurred where no intent to violate the law seems to exist; and it is but just to the department of the treasury to say that, in the exercise of this discretion, great generosity and mercy have been shown, as against parties innocent of any intent to violate the law. This power may be exercised by the Secretary of the Treasury even in suits brought by informers before actual trial and judgment, and these sections giving him this power are not unconstitutional, as violating the pardoning power of the President.[14]

[10] U. S. v. Stowell, 133 U. S. 17, 10 Sup. Ct. 244, 33 L. Ed. 555; 581 Diamonds v. U. S., 119 Fed. 556, 56 C. C. A. 122, 60 L. R. A. 595. *See "Customs Duties," Dec. Dig. (Key-No.) § 130; Cent. Dig. §§ 296–315.*

[11] U. S. Comp. St. 1901, p. 2328.

[12] U. S. v. Shapleigh, 54 Fed. 126, 4 C. C. A. 237. *See "United States," Dec. Dig. (Key-No.) § 122; Cent. Dig. § 110.*

[13] U. S. Comp. St. 1901, pp. 3605–3607. Some of these powers are now vested in the Department of Commerce and Labor. 32 Stat. 825, 829 (U. S. Comp. St. Supp. 1911, p. 122, § 10).

[14] The Laura, 114 U. S. 411, 5 Sup. Ct. 881, 29 L. Ed. 147. *See "Pardon," Dec. Dig. (Key-No.) § 4; Cent. Dig. § 5.*

ADMIRALTY

28. Jurisdiction in matters of admiralty and maritime law is vested in the district court, and this jurisdiction is made exclusive, except where expressly specified to the contrary. This is an important class of jurisdiction of the district courts.

SAME—NATURE AND FORM

29. The admiralty procedure is in rem or in personam, and extends to matters in contract and in tort coming under the admiralty and maritime law. The practice is largely governed by a set of rules prescribed by the Supreme Court for the purpose.

The third clause of section 24 of the Judicial Code gives the court jurisdiction of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, of all seizures on land and on waters not within admiralty and maritime jurisdiction and of all prizes brought into the United States; and the jurisdiction of the district court over admiralty causes is made exclusive except where expressly specified to the contrary.

The admiralty and maritime jurisdiction of the district courts—at least of those district courts on the seacoast or important navigable waters—is probably its most important class of jurisdiction. The procedure in admiralty is sui generis, consisting of actions in rem and actions in personam. Those in rem are against the vessel or thing itself. Those in personam are ordinary civil suits on the admiralty side of the court against individuals for admiralty causes of action.

Cases of admiralty cognizance are either in contract or in tort. Those in contract depend upon the character of the cause of action, those being of admiralty cognizance which are marine in their nature. Those in tort depend upon the locality, admiralty having jurisdiction of such actions where they arise and become consummate on navigable waters within the jurisdiction of the admiralty courts. Illustrations of admiralty causes of action in contract are suits against vessels for supplies and repairs, suits under charter parties, and suits on bills of lading; and illustrations of actions of tort in the admiralty are collisions between vessels, and personal injuries inflicted by negligence on navigable waters. The pleading which sets out the cause of action is called a libel, and the defense is made by answer or exception. In an action in rem, the property itself is seized, and, if not bonded, the libelant has a decree of sale of the property entered by the court, and it is sold by the marshal, and the proceeds applied to pay the claims asserted against it. The procedure and practice in the admiralty courts are regulated by the rules in admiralty prescribed by the Supreme Court for the government of admiralty causes. They provide a simple and excellent system of pleading, by which causes are quickly matured, and substantial justice administered.

Most of these admiralty causes of action are of a nature that gives the common-law courts also jurisdiction; that is, jurisdiction over the cause of action, but not jurisdiction over the procedure. For instance, in a case of collision between two vessels, the injured party can proceed by a libel in rem against the other vessel, and the district court alone has jurisdiction of such a pleading.[15] But on the other hand, as a collision is a tort at common law, if due to neg-

[15] The Glide, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296. *See "Admiralty," Dec. Dig. (Key-No.) §§ 1–25; Cent. Dig. §§ 1–264; "Collision," Dec. Dig. (Key-No.) § 111; Cent. Dig. § 234; "Maritime Liens," Dec. Dig. (Key-No.) § 60; Cent. Dig. § 98.*

ligence, the injured party can bring an ordinary action of tort in a common-law court, or, if the citizenship and amount are requisite, he can bring an ordinary action of tort in the district court of the United States on its common-law side.[16]

PARTICULAR CLASSES OF CONTROVERSIES

30. The district court has jurisdiction, under section 24, paragraphs 4–18, inclusive, of the following particular classes of controversies, of greater or less importance:

(a) Under laws relating to slave trade;
(b) Under internal revenue, customs and tonnage laws;
(c) Under postal laws;
(d) Under patent, copyright and trade-mark laws;
(e) Violation of interstate commerce laws;
(f) On debentures;
(g) On account of acts done under laws of United States;
(h) Against persons having knowledge of conspiracy against civil rights;
(i) To redress deprivation under color of law of civil rights;
(j) To recover certain offices;
(k) Against national banking associations;
(l) By aliens for torts;
(m) Against consuls and vice consuls.

Suits under Laws Relating to Slave Trade

This constitutes paragraph 4 of section 24 (U. S. Comp. St. Supp. 1911, p. 136). It was a jurisdiction formerly exercised by the circuit court, but is now of no practical importance.

[16] The jurisdiction of the admiralty courts is so extensive that it is impossible in this treatise to discuss it. Reference is made to the author's treatise on Admiralty, published in the year 1901.

Cases Arising under Any Law Providing for Internal Revenue, or for Revenue from Imports or Tonnage, except That Conferred on the Court of Customs Appeals

This is paragraph 5 of section 24, and is intended as a combination of paragraph 5, § 563, of the Revised Statutes (U. S. Comp. St. 1901, p. 456), conferring on the district court jurisdiction of suits in equity to enforce liens for federal taxes on real estate, and paragraph 4, § 629, of the Revised Statutes (U. S. Comp. St. 1901, p. 503), which conferred jurisdiction of various questions of revenue on the circuit court.

Section 3207 of the Revised Statutes [17] gives the right to file a bill in chancery to enforce tax liens on real estate; and section 3213 [18] gives a right of action to the United States in any proper form of action or by any appropriate form of proceeding, qui tam or otherwise, before any circuit or district court of the United States for the district within which a fine or forfeiture may have been incurred, for the recovery of forfeitures under the tax laws connected with the internal revenue; and the same section gives a right of action for taxes in the district where the liability to the tax is incurred, or where the party who owes the tax resides at the commencement of the action.[19]

Suits under Postal Laws

This is paragraph 6, § 24, and was taken from paragraph 7, § 563, of the Revised Statutes.

Suits under Patent, Copyright and Trade-Mark Laws

This constitutes paragraph 7 of section 24, and is one of the classes of jurisdiction formerly exercised by the circuit court.

[17] U. S. Comp. St. 1901, p. 2081.

[18] U. S. v. Mackoy, 2 Dill. 299, Fed. Cas. No. 15,696; U. S. v. Rindskopf, 8 Biss. 507, Fed. Cas. No. 16,166. *See "Courts," Dec. Dig. (Key-No.) § 297.*

[19] U. S. Comp. St. 1901, p. 2083.

This very extensive ground of federal jurisprudence cannot be discussed in the limits prescribed by this treatise, and must be left to books dealing specially with that subject.

The mere fact that a patent may be incidentally connected with the litigation is not sufficient to confer jurisdiction under this clause. The right of the party must depend directly upon the patent or copyright law itself, and must not be merely incidentally involved. It does not cover mere suits on contracts connected with a patent, like questions of construction, or questions involving the validity of a license to use a patent.[20]

A suit to enjoin the assessment of taxes on the ground that they are levied on patent rights is not a suit arising under the patent or copyright laws of the United States, in the sense of this statute.[21] On the other hand, an action for damages for the infringement of a copyright, under the provisions of section 4966 of the Revised Statutes,[22] does arise under the patent or copyright laws of the United States,[23] as also a suit to recover the penalty of one dollar for each copy of the copyrighted article circulated contrary to the provisions of section 4965 of the Revised Statutes.[24]

[20] Excelsior Wooden Pipe Co. v. Bridge Co., 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910; H. C. Cook Co. v. Beecher, 217 U. S. 497, 30 Sup. Ct. 601, 54 L. Ed. 855; Henry v. A. B. Dick Co., 224 U. S. 1, 32 Sup Ct. 364, 56 L. Ed. 645; The Fair v. Kohler D. & S. Co., 228 U. S. 22, 33 Sup. Ct. 410, 57 L. Ed. ——; post, pp. 242, 490. *See "Courts," Dec. Dig. (Key-No.) § 290; Cent. Dig. § 832.*

[21] Holt v. Manufacturing Co., 176 U. S. 68, 20 Sup. Ct. 272, 44 L. Ed. 374. *See "Courts," Dec. Dig. (Key-No.) § 290; Cent. Dig. § 832.*

[22] U. S. Comp. St. 1901, p. 3415.

[23] Brady v. Daly, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. Ed. 109. *See "Courts," Dec. Dig. (Key-No.) § 291; Cent. Dig. §§ 833; "Copyrights," Cent. Dig. §§ 49, 67.*

[24] Falk v. Publishing Co. (C. C.) 100 Fed. 77; Id., 107 Fed. 126, 46 C. C. A. 201; Werckmeister v. American Tobacco Co., 207 U. S. 375, 28 Sup. Ct. 125, 52 L. Ed. 254. *See "Courts," Dec. Dig. (Key-No.) § 291; Cent. Dig. §§ 833; "Copyrights," Cent. Dig. §§ 49, 67.*

Suits for Violation of Interstate Commerce Laws

This is paragraph 8 of section 24. The proceedings which are exclusively to be taken in the commerce court are excepted from the operation of this paragraph. This exception is set out in section 207 of the Judicial Code (U. S. Comp. St. Supp. 1911, p.216).*

No clause of the Constitution has been responsible for as much legislation in recent years as the commerce clause. It has been used as a clothesline on which to hang everything; and a discussion of the legislation under it is far beyond the purview of this treatise. The best known examples are the statutes regulating carriers in their relation to the public and their employees, anti-trust laws, pure food laws and laws against the "white slave" traffic. The decisions on these various laws are increasingly numerous. A few of the later ones are added in a footnote.[25]

* The Commerce Court is now abolished. See post, p. 701.

[25] (1) Under the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]): Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 106, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7; Int. Comm. Commission v. Union Pacific R. Co., 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308; Railroad Commission of Ohio v. Worthington, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004. (2) Under the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]): Southern Railway Co. v. U. S., 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72; Pacific Coast Railway Co. v. U. S., 173 Fed. 448, 98 C. C. A. 31. (3) Under the employer's liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]): Mondou v. New York, N. H. & H. R. Co., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911; Missouri Pac. R. Co. v. Castle, 224 U. S. 541, 32 Supp. Ct. 606, 56 L. Ed. 875. (4) Under the pure food laws: Hipolite Egg Co. v. U. S., 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364; Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182; Standard Stock Food Co. v. Wright, 225 U. S. 540, 32 Sup. Ct. 784, 56 L. Ed. 1197. *See "Courts," Dec. Dig. (Key-No.) § 289; Cent. Dig. § 830.*

Suits on Debentures

This is the tenth paragraph of section 24, and is a combination of the jurisdiction heretofore exercised by both the district and circuit courts.

These debentures are issued in connection with the collection of duties, under the circumstances set out in sections 3038–3042 of the Revised Statutes.[26]

Suits for Injuries on Account of Acts Done under Laws of the United States

This is paragraph 11 of section 24, and is a jurisdiction heretofore conferred on the circuit court.[27]

Suits under the Civil Rights Amendments and Statutes

These constitute paragraphs 12, 13, 14, and 15 of section 24.

These acts have been the subject of some interesting decisions by the Supreme Court. It has been held that the exclusion of colored men from juries is a violation of these acts, and gives a colored man who is being proceeded against a good ground of exception.[28] The mere fact, however, of separating the races, is not a violation of this act, provided equal accommodations are furnished to both. This applies to their separation in public schools or on public conveyances.[29] And it has also been held that a statute which does not in terms discriminate against the

[26] U. S. Comp. St. 1901, p. 1997–1999.

[27] See Crawford v. Johnson, 6 Fed. Cas. 777; Knight v. Shelton (C. C.) 134 Fed. 423. *See "Courts," Dec. Dig. (Key-No.) §§ 282, 284; Cent. Dig. §§ 820–838.*

[28] In re Virginia, 100 U. S. 339, 25 L. Ed. 676; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567; Carter v. Texas, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839. *See "Civil Rights," Dec. Dig. (Key-No.) § 10; Cent. Dig. § 5; "Constitutional Law," Dec. Dig. (Key-No.) § 221; Cent. Dig. § 724.*

[29] Davenport v. Cloverport (D. C.) 72 Fed. 689; Cumming v. Board, 175 U. S. 528, 20 Sup. Ct. 197, 44 L. Ed. 262; Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256. *See "Civil Rights," Dec. Dig. (Key-No.) §§ 5–9; Cent. Dig. §§ 6–10; "Constitutional Law," Dec. Dig. (Key-No.) §§ 215–220; Cent. Dig. §§ 714–720.*

colored race or deprive them of the right to vote is not void on that account where that result is merely incidental, and where it does not appear that there is any purpose in the administration of the law to discriminate against them.[30]

Some of the provisions of the civil rights act of March 1, 1875,[31] have been held unconstitutional.[32]

An interesting discussion of the subject will be found in Brawner v. Irwin [33] and Bailey v. Alabama (a peonage case).[34]

Suits against National Banking Associations

This is paragraph 16 of section 24. In substance it applies to suits by the United States or its officers, and suits for winding up the affairs of such banks, and suits by such banks against the comptroller of the currency or any receiver appointed by him under the provisions of the national banking act. As to all other suits by or against national banks, the paragraph provides that such a bank shall be deemed a citizen of the state in which it is located.

This paragraph combines the former district and circuit court jurisdiction given by the Revised Statutes with the qualifying clause as to citizenship taken from the acts of July 12, 1882,[35] and August 13, 1888.[36]

[30] Williams v. Mississippi, 170 U. S. 213, 18 Sup. Ct. 583, 42 L. Ed. 1012. See, in general, Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835. *See "Elections," Dec. Dig. (Key-No.) § 12; Cent. Dig. § 8.*

[31] U. S. Rev. St. § 1977 et seq. (U. S. Comp. St. 1901, p. 1259 et seq.)

[32] Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835. *See "Civil Rights," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1, 2; "Constitutional Law," Dec. Dig. (Key-No.) § 209; Cent. Dig. § 678.*

[33] (C. C.) 169 Fed. 964. *See "Civil Rights," Dec. Dig. (Key-No.) §§ 1, 13; Cent. Dig. §§ 1, 2, 11, 12; "Courts," Dec. Dig. (Key-No.) § 282.*

[34] 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191. *See "Constitutional Law," Dec. Dig. (Key-No.) § 83; Cent. Dig. §§ 150–151½.*

[35] U. S. Comp. St. 1901, p. 3457.

[36] U. S. Comp. St. 1901, p. 514.

Until these acts, the district court had jurisdiction of suits by or against national banks, regardless of either the question of citizenship or of the amount involved.[37] Suits between a national bank and a citizen of its own state can no longer be brought in the federal courts, unless there is some other ground of jurisdiction involved in the suit, such as the existence of a federal question.[38] If the court would have jurisdiction of the cause of action provided the national bank was a state bank, it would still have jurisdiction, but these cases would go into the district court on the ground of diversity of citizenship or the existence of a federal question; these grounds being discussed in another connection.[39]

Suits by Aliens for Tort, and Suits against Consuls or Vice Consuls

Jurisdiction of these cases is conferred on the district court by the seventeenth and eighteenth paragraphs of section 24. They are maintainable against a consul under these provisions, though the consul may be a citizen of the United States appointed as consul by some foreign power.[40]

[37] Kennedy v. Gibson, 8 Wall. 498, 19 L. Ed. 476. *See "Banks and Banking," Dec. Dig. (Key-No.) § 275; Cent. Dig. §§ 1056–1066; "Courts," Dec. Dig. (Key-No.) § 282.*

[38] National Bank of Jefferson v. Fore (C. C.) 25 Fed. 209; Union Nat. Bank v. Miller (C. C.) 15 Fed. 703. *See "Banks and Banking," Dec. Dig. (Key-No.) § 275; Cent. Dig. §§ 1056–1066.*

[39] Leather Manufacturers' Nat. Bank v. Cooper, 120 U. S. 778, 7 Sup. Ct. 777, 30 L. Ed. 816; Huff v. Union National Bank (C. C.) 173 Fed. 333; International Trust Co. v. Weeks, 203 U. S. 364, 27 Sup. Ct. 69, 51 L. Ed. 224; post, p. 240. *See "Banks and Banking," Dec. Dig. (Key-No.) § 275; Cent. Dig. §§ 1056–1066.*

[40] Baiz, In re, 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222. See, in general, Iasigi v. Van De Carr, 166 U. S. 391, 17 Sup. Ct. 595, 41 L. Ed. 1045; Börs v. Preston, 111 U. S. 261, 4 Sup. Ct. 407, 28 L. Ed. 419. *See "Ambassadors and Consuls," Dec. Dig. (Key-No.) § 8; Cent. Dig. §§ 23–25; "Courts," Dec. Dig. (Key-No.) §§ 301, 518; Cent. Dig. § 842.*

CHAPTER V

THE DISTRICT COURT (Continued)—BANKRUPTCY

81. Bankruptcy—Jurisdiction Over.
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BANKRUPTCY—JURISDICTION OVER

31. The district court is the principal tribunal exercising supervision over matters of bankruptcy.

SAME—HISTORY OF THE LEGISLATION

32. Several United States bankruptcy statutes have been in force at different intervals, varying somewhat in their nature according to the exigencies of the period. The present statute on the subject was put into force by the act of July 1, 1898.[1]

[1] U. S. Comp. St. 1901, p. 3418.

SAME—POLICY OF THE LEGISLATION

33. The general policy of bankrupt laws is at once the relief of honest but unfortunate debtors, by enabling them to start life anew, relieved of a load of indebtedness which would otherwise crush their future, and again the protection of the bankrupt's creditors, who find a remedy in its provisions for the better enforcement of their claims. The policy of these laws has varied according as they have had most in view the protection of the creditor or the relief of the debtor. The necessity for uniform legislation on this subject vindicates the wisdom of vesting the national government with the power to regulate the question.

Paragraph 19, § 24, of the Judicial Code, confers on the district court original jurisdiction of all matters and proceedings in bankruptcy.

Article 1, § 8, of the Constitution, conferred power upon Congress, among other things, to establish uniform laws on the subject of bankruptcies throughout the United States. This power was not exercised until 1800, when the first bankrupt law was passed. It remained in force but a short time. In 1841 another bankrupt law was passed, which also was repealed very shortly. Soon after the Civil War, and largely in consequence of the financial misfortunes which had been caused by it, the act of March 2, 1867, was passed. This law remained in force for over twenty years, when it, too, was repealed. Then for a period of about twenty years no national bankrupt law was in force, but the act of July 1, 1898, put into force the present statute on the subject.

Bankrupt laws are based upon sound reasons of public policy, and the importance of having uniform laws of this character throughout the United States was the main rea-

son which induced the authors of the national Constitution to confide that power to Congress instead of the states. By a national bankrupt law the rights of creditors can best be protected against frauds of dishonest debtors and partial state legislation in favor of the resident debtor against the nonresident creditor. On the other hand, a national bankrupt law, as distinguished from a state law, is in the interest of the honest debtor as well, for thereby alone can he obtain a release from all of his debts; since a state statute, which has no extraterritorial jurisdiction, could not discharge him from the claims of nonresident creditors. The proper purposes of a bankrupt act, therefore, are to protect creditors from fraud, to secure an equal and equitable distribution of a debtor's estate among his creditors, and to relieve honest debtors from the burden of debts which have fallen upon them through misfortune, and which they could never pay. The state itself, as has been well said, has an interest in extending this relief to such debtors, since it is for the good of the state that all its members should be industrious, and contribute their efforts to building up the general prosperity. Any one who has been so unfortunate as to contract an enormous load of indebtedness, which he recognizes to be beyond his ability to pay, even by the labor of a lifetime, is liable to have his industry paralyzed, and to become a mere drone on society. On the other hand, if he is allowed to turn over all his property as a trust fund to his creditors, and secure a discharge from his indebtedness, he can start life anew, with the feeling that he will reap some benefit from his labor, and will thereby be induced again to become a useful member of the body politic.

The policy of bankrupt laws has varied according as the lawmakers have had most in mind the protection of the creditor or the relief of the debtor. The act of March 2, 1867, with which the older members of the bar are familiar, was mainly a collection law in the interest of the creditor,

though it did not entirely lose sight of the interest of the debtor. The present law was in its inception mainly in the interest of the debtor. Subsequent amendments, however, have changed this considerably, and made it more of a collection law, though it still remains as to its distinctive features primarily in the interest of the debtor.

A bankrupt law is in a certain sense a proceeding in rem. It treats the debtor's property as a trust fund, takes charge of it through the machinery of the bankrupt court, and divides it among his creditors.[2]

Nothing can better illustrate the advance in civilization than the contrast between the present and former methods of treating the debtor. The old laws of imprisonment for debt locked up many deserving, talented, and industrious citizens, withdrew them from the general class of producers, and made them a charge upon the community. The horrors of this state of affairs have played too prominent a part, in history and literature, to require more than a passing reminder. On the other hand, the abolition of imprisonment for debt and the enactment of the bankrupt laws have placed every citizen in a position where he not only can, but probably will, labor for the general weal, as he still has left the motive of acquisition, which is the mainspring of prosperity.

In view of the object of a bankrupt law, the courts have treated such laws, not as special statutory proceedings, to be strictly construed, like attachment laws, but as remedial, and to be liberally construed. On this point Judge Deady has said in In re Muller:[3] "In the course of the argument counsel have insisted that this is a special proceeding, purely statutory, and that the act must be taken most

[2] Hills v. The McKimmiss Co. (D. C.) 188 Fed. 1012. *See "Bankruptcy," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 3, 4.*

[3] Fed. Cas. No. 9,912. See, also, Blake, Moffit & Towne v. Valentine (D. C.) 89 Fed. 691; Norcross v. Nathan (D. C.) 99 Fed. 418; Botts v. Hammond, 99 Fed. 916, 920, 40 C. C. A. 179. *See "Bankruptcy," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 3, 4.*

strictly against the creditor and in favor of the bankrupt. In my judgment, this view of the matter is not supported by reason or authority. The act does not attempt to punish the bankrupt, but to distribute his property fairly and impartially between his creditors, to whom in justice it belongs. It is remedial, and seeks to protect the honest creditor from being overreached and defrauded by the unscrupulous. It is intended to relieve the honest but unfortunate debtor from the burden of liabilities which he cannot discharge, and allow him to commence the business of life anew. The power to pass bankrupt laws is one of the express grants of power to the national government, and history teaches that the want of a uniform law on this subject throughout the states was one of the prominent causes which led to the assembling of the constitutional convention, and consequent formation and adoption of the federal Constitution. Such a statute is not to be construed strictly, as if it were an obscure or special penal enactment, and this was the sixteenth instead of the nineteenth century. The act establishes a system, and regulates, in all their details, the relative rights and duties of debtor and creditor. Such an act must be construed—as, indeed, should all acts—according to the fair import of its terms, with a view to effect its objects and to promote justice."

CONSTITUTIONALITY OF BANKRUPT LEGISLATION

34. A national bankrupt law may constitutionally provide for discharges from debts existing at the time of its passage; also for an adjudication without notice to creditors. It may limit the classes to which it applies, and adopt state exemptions, though they vary in the different states, without contravening the constitutional requirement of uniformity.

Although the Constitution forbids a state from passing any laws that would impair the obligation of contracts, there is no similar prohibition against congressional action. For this reason a national bankrupt law can accomplish the objects of bankruptcy legislation when a state law could not; for Congress can pass a bankrupt law that would authorize the discharge of the debtor not only from debts incurred subsequent to the passage of the law, but also from debts existing at the time of its passage.[4] Under its power to pass a bankrupt law, Congress can also prescribe penal offenses for violation of its provisions, but it could not make a penal law ex post facto; so that an act innocent at the time it was committed cannot be made, even by Congress, an offense upon the happening of some subsequent act either of the bankrupt or another.[5]

As a bankrupt procedure is in the nature of a proceeding in rem, a bankrupt law is not invalid, as depriving creditors of their property without due process of law, because it fails to provide for notice to them of the adjudication of bankruptcy. Under the voluntary proceeding, as will be seen later on, the debtor, on filing his petition, is adjudged a bankrupt by the court without giving notice to his creditors; but the law requires notice of subsequent proceedings to be given, so that, before any distribution of the property so surrendered by the debtor, the creditors have ample opportunity to prove their claims and litigate any questions in which they are interested. They also have opportunity to contest the right of the bankrupt to a discharge; hence they have their day in court, and the law for that reason is constitutional.[6]

[4] In re Owens, Fed. Cas. No. 10,632; Darling v. Berry (C. C.) 13 Fed. 659. *See "Bankruptcy," Dec. Dig. (Key-No.) § 5; Cent. Dig. § 2.*

[5] U. S. v. Fox, 95 U. S. 670, 24 L. Ed. 538. *See "Bankruptcy," Dec. Dig. (Key-No.) § 6; Cent. Dig. § 2.*

[6] HANOVER NAT. BANK v. MOYSES, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113. *See "Bankruptcy," Dec. Dig. (Key-No.) § 3; Cent. Dig. § 1; "Constitutional Law," Dec. Dig. (Key-No.) § 309; Cent. Dig. §§ 929, 930.*

The Constitution, giving Congress the power to enact bankruptcy laws, requires that they shall be uniform. The present act and the act of March 2, 1867, provided that the exemptions allowed by the different state laws should be preserved for the benefit of the bankrupt. As these varied in different states, it was contended under both of these statutes that the law was unconstitutional for lack of uniformity; but the courts have decided that this provision did not destroy its uniformity, as it was uniform in its general provisions and procedure, and the states could best judge of the need of an exemption and the extent of it.[7]

Nor does the act in its original form lose its character of uniformity from the fact that it allowed individuals to file a voluntary petition, but denied that privilege to a corporation, and the further fact that it limited the right of proceeding in involuntary cases to a certain class of corporations; for the law is still uniform as to the classes affected by it, and it is within the discretion of Congress to regulate the parties to whom such a law shall apply. The original bankrupt legislation of England applied only to traders, and the earlier legislation of this country was limited in the same way. There are not the same reasons for giving a corporation a discharge from its debts that exist in the case of an individual. The ordinary procedure for winding up corporations is usually adequate, and, as to them, the reason of state policy which requires the debtor to be encouraged by a discharge, in order to induce him to continue his labors, does not apply. Hence the only reason for applying a bankrupt law to a corporation is to secure an equitable distribution of its assets among its creditors, and that can ordinarily be accomplished in other ways. Therefore Congress can, in its discretion, discrim-

[7] In re Beckerford, Fed. Cas. No. 1,209; Darling v. Berry (C. C.) 13 Fed. 659; HANOVER NAT. BANK v. MOYSES, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113. *See "Bankruptcy," Dec. Dig. (Key-No.) § 3; Cent. Dig. § 1.*

inate between corporations and individuals, and also as among corporations themselves, in deciding whether to make a bankrupt law apply.[8]

SAME—EFFECT OF FEDERAL ON STATE LEGISLATION

35. The national bankrupt laws do not invalidate state laws, but only cause them to become inoperative while the federal law remains in force.

Validity of State Insolvent Laws, and Effect on Such Laws of National Bankrupt Legislation

In the absence of any national bankrupt legislation, a state can pass laws in the nature of local insolvent laws, intended to secure an equitable distribution of a debtor's estate among his creditors, and to relieve a debtor of an unbearable load of debt; but, from their nature, these local laws can but partially accomplish their object. In the first place, the state cannot make them applicable to debts existing at the time of their passage, for the constitutional provision against impairing the obligation of contracts stands in the path. Nor can a state make such a law binding on parties living beyond its jurisdiction, as the power of a state does not extend beyond its own territory, and hence it cannot provide for giving the notice necessary to bind nonresidents. Such laws, however, are binding upon such nonresidents as voluntarily appear in the state court, prove their claim, and participate in the proceeding, for it is a mere question of notice, and by so appearing they submit themselves to the jurisdiction of the state court.[9]

[8] Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 37 C. C. A. 210; HANOVER NAT. BANK v. MOYSES, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113. *See "Bankruptcy," Dec. Dig. (Key-No.) § 43; Cent. Dig. § 38.*

[9] Baldwin v. Hale, 1 Wall. 223, 17 L. Ed. 531; GILMAN v. LOCKWOOD, 4 Wall. 409, 18 L. Ed. 432; Brown v. Smart, 145 U. S. 454,

When such state laws are in existence, and a national bankrupt law is passed, it supersedes but does not have the effect of completely nullifying the state law. It leaves it in a state of suspended animation, so that the instant the bankrupt law is repealed the state law comes again into effect, without any additional legislation by the state. On the same theory, if a state enacts a local law while a bankrupt law is in existence, that law is not absolutely null and void; it remains in suspension until the national bankrupt law is repealed, and then it takes immediate effect.[10] But state laws giving additional remedies in aid of execution or in cases not covered by the bankrupt law are not superseded.[11]

State laws regulating the administration of property conveyed under general assignments are not necessarily insolvent laws; and proceedings under them may be sustained when not in conflict with the bankrupt law, or in the absence of bankruptcy proceedings.[12]

12 Sup. Ct. 958, 36 L. Ed. 773. *See "Bankruptcy," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 7–9; "Assignments for Benefit of Creditors," Dec. Dig. (Key-No.) § 23; Cent. Dig. §§ 75–77, 88; "Insolvency," Dec. Dig. (Key-No.) § 2; Cent. Dig. § 1.*

[10] Tua v. Carriere, 117 U. S. 201, 6 Sup. Ct. 565, 29 L. Ed. 855; Butler v. Goreley, 146 U. S. 303, 13 Sup. Ct. 84, 36 L. Ed. 981; In re Salmon & Salmon (D. C.) 143 Fed. 395; In re Pickens Mfg. Co. (D. C.) 158 Fed. 894. *See "Bankruptcy," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 7–9.*

[11] Ex parte Crawford, 154 Fed. 769, 83 C. C. A. 474; State National Bank v. Syndicate Co. (C. C.) 178 Fed. 359. *See "Bankruptcy," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 7–9.*

[12] Johnson v. Crawford (C. C.) 154 Fed. 761; In re Farrell, 176 Fed. 505, 100 C. C. A. 63. *See "Bankruptcy," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 7–9; "Assignments for Benefit of Creditors," Dec. Dig. (Key-No.) § 23; Cent. Dig. §§ 75–77, 88.*

THE BANKRUPTCY COURTS

36. The courts of bankruptcy as designated by the statute, in the preliminary definitions, are the district courts of the United States and of the territories, the supreme court of the District of Columbia, and the United States courts of the Indian Territory and of Alaska, and these tribunals are invested with such powers as will enable them to exercise control in matters of bankruptcy.

The question of the proper forum, as to locality, is fixed by the terms of the statute, together with certain rules of the Supreme Court promulgated under the authority of the statute.

The second section of the bankrupt act provides that "the courts of bankruptcy, as hereinbefore defined, namely, the district courts of the United States in the several states, the supreme court of the District of Columbia, the district courts of the several territories, and the United States courts in the Indian Territory and the district of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings in vacation, in chambers and during their respective terms, as they are now or may be hereafter held," to do the various things incidental to the administration of the bankruptcy law.

The Proper Forum as to Locality

Under this section, the court having jurisdiction to adjudge a person bankrupt is the court of the district wherein the bankrupt has had his principal place of business, resided, or had his domicile for the preceding six months,

or the greater portion thereof, or who, though not having his principal business, residence, or domicile within the United States, has property within its jurisdiction, or who, though without the United States, has been adjudged bankrupt by a court of competent jurisdiction, and has property within the jurisdiction of such district court. Under section 30 of the bankrupt law the Supreme Court is given the power to prescribe necessary rules, forms, and orders as to procedure in bankruptcy; and, pursuant to that right, certain rules were made by the Supreme Court at the October term, 1898, the first term after the bankrupt law was enacted. Under this power the court has prescribed that, where a proceeding has been instituted in more than one district, the first hearing shall be had in the district in which the debtor has his domicile, but in case of partnerships the first hearing shall be had on the petition first filed, or, in case of voluntary petitions by different members of the same partnership, the court in which the petition is first filed shall take and retain jurisdiction, subject to the right prescribed by the bankrupt act to transfer cases to the district where it can be proceeded with for the greatest convenience of parties in interest.[13]

Under these provisions, where a bankrupt had a workshop in one district, but carried on business on his own account in another, it was held that the latter was a proper district in which to file a petition, though the court did not go so far as to say that it could not have been filed in the other.[14] So in an involuntary proceeding against a corporation which had its main works in Rhode Island, but had shut down there, and continued business in New York, where its executive and banking business was done, it was held that the petition could properly be filed in New York.[15] In the case of a party who spent most of his

[13] Bankr. Rule 6, 172 U. S. 654, 18 Sup. Ct. v, 43 L. Ed. 1189.

[14] Tiffany v. La Plume Condensed Milk Co. (D. C.) 141 Fed. 444. *See "Bankruptcy," Dec. Dig. (Key-No.) § 16; Cent. Dig. § 20.*

[15] In re Marine Machine & Conveyor Co. (D. C.) 91 Fed. 630. The

time abroad, it was held that he could still file his petition in the district of his domicile, if his original domicile had not been given up, and he had returned before filing his petition, with the intention of making his home at that point.[16] Under the power to transfer from one district to another given by section 32 of the act, an involuntary petition had been filed in Georgia, and the debtor had filed his voluntary petition in New York. He had lived in Georgia. The great bulk of his debts had been contracted there, and he was an employé of a corporation which was located in Georgia, and had succeeded to the business of his former firm. It was held in this case that Georgia was the proper and most convenient district, and that the right to transfer applied not simply to involuntary cases, but to an involuntary proceeding in one district, and a voluntary in another.[17] But if a petition is filed where the debtor had not resided or been domiciled, a creditor who wishes to object must do so promptly. He cannot come into the proceeding, prove his claim, and then urge this lack of jurisdiction in opposition to the bankrupt's discharge; for by coming into the proceeding he has waived any objections to jurisdiction; the question being merely one of personal jurisdiction, and not of jurisdiction over the subject-matter.[18]

principal place of business of a corporation is a question of fact, not necessarily controlled by its charter. Burdick v. Dillon, 144 Fed. 737, 75 C. C. A. 603; In re Matthews Consolidated Slate Co. (D. C.) 144 Fed. 724; In re Pennsylvania Consolidated Coal Co. (D. C.) 163 Fed. 579; In re Perry Aldrich Co. (D. C.) 165 Fed. 249. The fact that it has ceased operations where it had been conducting its principal business, and is engaged in liquidating its affairs, does not prevent proceedings against it in such district. Tiffany v. La Plume Condensed Milk Co. (D. C.) 141 Fed. 444; Robertson v. Union Potteries Co. (D. C.) 177 Fed. 279. *See "Bankruptcy," Dec. Dig. (Key-No.) § 16; Cent. Dig. § 20.*

[16] In re Williams (D. C.) 99 Fed. 544. *See "Bankruptcy," Dec. Dig. (Key-No.) § 14; Cent. Dig. § 20.*

[17] In re Waxelbaum (D. C.) 98 Fed. 589. *See "Bankruptcy," Dec. Dig. (Key-No.) § 18; Cent. Dig. § 22.*

[18] In re Worsham, 142 Fed. 121, 73 C. C. A. 665; In re Walrath

PARTIES—VOLUNTARY PROCEEDINGS

37. Any person who owes debts, except certain corporations, may avail himself of the benefits of the act as a voluntary bankrupt. This, however, does not apply to any one non compos mentis, nor to one under legal disability.

This applies to a resident alien.[19] Notwithstanding its broad language, however, there are some parties who cannot avail of the act. An infant cannot file a voluntary petition in bankruptcy, nor can an involuntary petition be filed against him; for an infant needs no discharge against the great mass of his debts. Hence, where an involuntary proceeding had been instituted against a partnership which had an infant member, the proceeding was dismissed as to him, though it was retained as to the other partners.[20] On similar principles, a lunatic cannot file a voluntary petition, nor can an involuntary petition be filed against him for debts incurred while non compos mentis, as a lunatic could not commit an act of bankruptcy. If, however, the act of bankruptcy was committed while sane, his supervening lunacy would not prevent a procedure against him.[21] Nor can a married woman file a voluntary petition, or be proceeded against, except in states where her common-law

(D. C.) 175 Fed. 243. *See "Bankruptcy," Dec. Dig. (Key-No.) § 21; Cent. Dig. § 24.*

[19] In re Boynton (D. C.) 10 Fed. 277. *See "Bankruptcy," Dec. Dig. (Key-No.) § 13; Cent. Dig. §§ 13–16.*

[20] In re Duguid (D. C.) 100 Fed. 274; In re Stein, 127 Fed. 547, 62 C. C. A. 272; Jennings v. Stannus, 191 Fed. 347, 112 C. C. A. 91. *See "Bankruptcy," Dec. Dig. (Key-No.) § 13; Cent. Dig. §§ 13–16.*

[21] In re Marvin, Fed. Cas. No. 9,178; In re Pratt, Fed. Cas. No. 11,371; In re Weitzel, Fed. Cas. No. 17,365; In re Kehler, 153 Fed. 235; Id., 159 Fed. 55, 86 C. C. A. 245. *See "Bankruptcy," Dec. Dig. (Key-No.) § 13; Cent. Dig. §§ 13–16.*

disabilities have been removed, and she has power to contract.[22]

The eighth section of the present bankrupt law provides, also, that the death or insanity of the bankrupt shall not abate the proceedings. This alludes to death or insanity supervening after the filing of the petition. The original act excluded corporations from the class entitled to file voluntary petitions. But the amendment of June 25, 1910,[23] changed this so as to deny the privilege only to "municipal, railroad, insurance or banking corporations."

SAME—INVOLUNTARY PROCEEDINGS

38. Under the fourth section of the bankrupt act, as amended February 5, 1903, and June 25, 1910, any natural person, except a wage earner, or a person engaged chiefly in farming or tillage of the soil, any unincorporated company, and any moneyed, business or commercial corporation, except a municipal, railroad, insurance or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt. This is inapplicable to persons under legal disabilities, on the same principle as the exception above stated in the case of voluntary bankruptcy.

For reasons already given, infants, lunatics, and married women cannot be proceeded against under the qualifications stated, so that they are excepted as much as if they had been expressly named. All other natural persons, ex-

[22] In re Kinkead, Fed. Cas. No. 7,824; In re Goodman, Fed. Cas. No. 5,540; McDonald v. Tefft-Weller Co., 128 Fed. 381, 63 C. C. A. 123, 65 L. R. A. 106. *See "Bankruptcy," Dec. Dig. (Key-No.) § 13; Cent. Dig. §§ 13–16.*

[23] 36 Stat. 838 (U. S. Comp. St. Supp. 1911, p. 1493).

cept those named in the act, may be proceeded against. The better opinion is that the status of the party at the time of the act of bankruptcy governs.[24]

Wage Earners and Farmers

The exception of wage earners from the list of involuntary bankrupts introduces a large field for construction by the courts. The twenty-seventh of the preliminary definitions in the act defines it as meaning an individual who works for wages, salary, or hire, at a rate of compensation not exceeding $1,500 per year. But for this definition, it would probably have been held to include those who work for wages, as distinguished from those who work for salaries, or compensation measured by the work rather than the period. The word "wages" usually implies the compensation of persons of small means.[25] Counsel fees are considered as above the grade of wages, and could hardly be included.[26] Under similar statutes, like lien acts, a contractor is not usually counted as an employé, nor his compensation as wages.[27] Another section of the act (section 64) names among the preferred debts wages due to workmen, clerks, or servants. It is not entirely safe to consider the decisions construing this section as in point in reference to the meaning of "wage earner," for the use of different language by Congress is indicative of different intent; and, besides, a clause changing the ordinary rule of equality would be more strictly construed than the first. Under this latter section, however, it has been held that

[24] In re Leland (D. C.) 185 Fed. 830. Compare In re Wakefield (D. C.) 182 Fed. 247. *See "Bankruptcy," Dec. Dig. (Key-No.) § 67; Cent. Dig. §§ 17–18, 86, 87.*

[25] Gordon v. Jennings, 9 Q. B. Div. 45. *See "Bankruptcy," Dec. Dig. (Key-No.) § 68; Cent. Dig. §§ 18, 86, 87.*

[26] Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501, 11 Sup. Ct. 405, 34 L. Ed. 1023. *See "Bankruptcy," Dec. Dig. (Key-No.) § 68; Cent. Dig. §§ 18, 86, 87.*

[27] Riley v. Warden, 2 Exch. 59; Vane v. Newcombe, 132 U. S. 220, 10 Sup. Ct. 60, 33 L. Ed. 310. *See "Bankruptcy," Dec. Dig. (Key-No.) § 68; Cent. Dig. §§ 18, 86, 87.*

a traveling salesman who is paid a salary of five thousand dollars does not secure any priority on account of "wages due to workmen, clerks, or servants." [28] Nor does the clause apply to the general manager of a mercantile corporation, who is paid a salary of twelve hundred dollars per annum, or to the president of a business corporation who is paid a salary of seven hundred dollars per annum.[29] As to tillers of the soil, reference may be made to the cases cited below.[30]

Decedents

There is no such thing as a proceeding in involuntary bankruptcy against a decedent's estate.[31] The reason is that the ordinary laws for the administration of estates give ample remedies for securing its just distribution among creditors; and, as far as the debtor is concerned, he can hardly be considered as interested in securing a discharge.

Corporations

As to the corporations against whom involuntary proceedings may be taken, the policy of the law in its original form was very different from that of the act of March 2, 1867 (14 Stat. 517, c. 176). That act allowed the proceeding against all moneyed, business, and commercial corpo-

[28] In re Scanlan (D. C.) 97 Fed. 26; In re Greenewald (D. C.) 99 Fed. 705. *See "Bankruptcy," Dec. Dig. (Key-No.) § 68; Cent. Dig. §§ 18, 86, 87.*

[29] In re Grubbs-Wiley Grocery Co. (D. C.) 96 Fed. 183; In re Carolina Cooperage Co. (D. C.) 96 Fed. 950. *See "Bankruptcy," Dec. Dig. (Key-No.) § 68; Cent. Dig. §§ 18, 86, 87.*

[30] In re Thompson (D. C.) 102 Fed. 287; In re Luckhardt (D. C.) 101 Fed. 807; In re Wakefield (D. C.) 182 Fed. 347; In re Dwyer (C. C. A.) 184 Fed. 880; American Agricultural Chemical Co. v. Brinkley, 194 Fed. 411, 114 C. C. A. 373. *See "Bankruptcy," Dec. Dig. (Key-No.) § 68; Cent. Dig. §§ 18, 86, 87.*

[31] Adams v. Terrell (C. C.) 4 Fed. 796. But the proceedings do not abate. In re Hicks, 107 Fed. 910; In re Spalding, 139 Fed. 244, 71 C. C. A. 370. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 25, 67; Cent. Dig. §§ 53, 134.*

rations and joint stock companies. The language of the present act as originally passed limited the procedure to corporations engaged principally in mining, manufacturing, trading, printing, publishing or mercantile pursuits. But the later amendments have made it about as wide as the act of March 2, 1867, and have rendered useless a number of decisions construing the original act.

PLEADINGS

39. Bankruptcy proceedings are instituted by filing a petition sworn to by the petitioner, made out upon certain forms prescribed by the Supreme Court, which petition sets forth the facts necessary to show the jurisdiction and the grounds of bankruptcy.

With the voluntary petition are filed various schedules showing creditors, liabilities, assets, securities, and exemptions. In the involuntary proceeding the schedules need only be furnished by the petitioner in the event the bankrupt is absent or cannot be found. All creditors with provable claims can file petitions in involuntary bankruptcy when an act of bankruptcy has been committed. In bankruptcy proceedings, amendments are freely allowed. A petition once filed cannot be dismissed without notice to the creditors.

Voluntary Proceedings

Voluntary proceedings are instituted by the filing of a petition by the person entitled to the benefits of the act as a voluntary bankrupt. Form 1 [82] prescribed by the Supreme Court is used for this purpose. It contains allegations necessary to show the court the district in which it

[82] 172 U. S. 667, 18 Sup. Ct. xi, 43 L. Ed. 1195.

should be filed; also a statement that the petitioner owes debts which he is unable to pay in full, and that he is willing to surrender his property for the benefit of his creditors, except such as is exempt by law, and that he desires to obtain the benefit of the bankrupt act. It ends by a prayer that he be adjudged a bankrupt, and is sworn to. Annexed to the petition is a series of schedules. Schedule A contains a statement of the bankrupt's debts, and is subdivided so as to show (1) a statement of all creditors who are to be paid in full, or to whom priority is secured by law; (2) a statement of creditors holding securities; (3) a statement of creditors whose claims are unsecured; (4) a statement of the bankrupt's liabilities on paper for which others are primarily liable; and (5) a statement of accommodation paper.

Schedule B is a statement of the bankrupt's property, and is subdivided so as to show (1) his real estate; (2) his personal property, classified under numerous subheadings; (3) his choses in action, which are shown separate from his other personal property; (4) his property in reversion, remainder, or expectancy; (5) his property claimed as exempt; and (6) the books, papers, and other documents relating to his business and estate. At the end of these two detailed schedules is a summary both of his debts and assets. This form requires the report of every thing claimed to be exempt, though, as a matter of fact, the exemption comes under the control of the bankrupt court only in a very qualified way. The eleventh subdivision of section 47 of the act requires the trustee to set apart the bankrupt's exemption, and report the items and estimated value thereof to the court as soon as practicable after his appointment. While, therefore, the bankrupt court has the power of examining into the exemption to this extent, yet, when the exemption has once been set apart, it belongs to the bankrupt exclusively, and the court has no jurisdiction of controversies concerning it, as it is

not part of the trust fund under the court's control.[33] The bankrupt court will follow the state decisions construing exemption laws.[34]

Pension money claimed as exempt under the provisions of the federal statutes must be reported.[35]

Partnership Petitions

Form 2 [36] of the forms prescribed is intended to be used for a partnership petition. The fifth section of the bankrupt act contains careful provisions intended to secure the distribution of the partnership assets to the partnership debts, and the individual assets to the individual debts; hence the partnership petition must not only show the jurisdictional facts necessary, as in the case of the individual petition, but it must further show separately the partnership assets and the assets of the individual partners. When all the partners join in a partnership petition, the proceeding is a voluntary one; and, if they should join in the petition, it is unnecessary for the individual partners to file separate petitions.[37] When a petition is filed by a portion only of the partners, which purports not only to be an individual petition, but a partnership petition, the proceeding as to the partners who do not join therein is an involuntary one, and they are entitled to notice, and an opportunity of contesting the proceeding. This is required by the eighth order in bankruptcy.[38] An individual peti-

[33] In re Camp (D. C.) 91 Fed. 745; Id., 97 Fed. 981, 38 C. C. A. 689; In re Grimes (D. C.) 96 Fed. 529; In re Yeager (D. C.) 182 Fed. 951; In re Baughman (D. C.) 183 Fed. 668. *See "Bankruptcy," Dec. Dig. (Key-No.) § 400; Cent. Dig. §§ 671–675.*

[34] In re Wyllie, Fed. Cas. No. 18,112; In re Gerber, 186 Fed. 693, 108 C. C. A. 511. *See "Bankruptcy," Dec. Dig. (Key-No.) § 396; "Courts," Dec. Dig. (Key-No.) § 366.*

[35] In re Bean (D. C.) 100 Fed. 262. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 396, 400.*

[36] 172 U. S. 679, 18 Sup. Ct. xviii, 43 L. Ed. 1207.

[37] In re Gay (D. C.) 98 Fed. 870. *See "Bankruptcy," Dec. Dig. (Key-No.) § 44.*

[38] Metzker v. Bonebrake, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654; In re Murray (D. C.) 96 Fed. 600; In re Altman (D. C.) 95 Fed.

tion, purporting to be on behalf of the individual only, would not involve any procedure against the partnership; for the individual member of a partnership may be insolvent; and the other partners, and the partnership itself, may be perfectly solvent.

As long as a partnership owes debts, bankruptcy proceedings may be taken, for there is no "final settlement," in the language of the fifth section of the act, when debts are due, though there may be no assets.[39]

When a voluntary petition is filed in the proper court, a bankruptcy adjudication is a matter of course, and it cannot be contested on the facts. Though the debtor may be solvent, if he voluntarily chooses to come into the bankrupt court and surrender his property for the benefit of his creditors, the court, in the language of Judge Lowell, "takes him at his word, and makes provision for carrying out his intention of distributing his property." The creditors would have no right to complain, or to deny his right, though he were solvent; and hence, in the case of a voluntary petition, it is not necessary, in any event, to allege insolvency, and the creditors have no right to contest the filing of the petition.[40] If, however, a petition is filed in a court which has no jurisdiction of it, creditors may, by prompt action, move to dismiss the petition for want of jurisdiction; but they cannot appear and participate in the proceeding, and afterwards question the jurisdiction of the court by opposing the bankrupt's discharge on that ground.[41]

263; 172 U. S. 656, 18 Sup. Ct. v, 43 L. Ed. 1190; In re Junck (D. C.) 169 Fed. 481. *See "Bankruptcy," Dec. Dig. (Key-No.) § 44.*

[39] In re Hirsch (D. C.) 97 Fed. 571. *See "Bankruptcy," Dec. Dig. (Key-No.) § 42.*

[40] In re Jehu (D. C.) 94 Fed. 638; HANOVER NAT. BANK v. MOYSES, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113. *See "Bankruptcy," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 41, 42.*

[41] In re Waxelbaum (D. C.) 98 Fed. 589; In re Walrath (D. C.) 175 Fed. 243. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 47, 48; Cent. Dig. §§ 41, 42.*

A bankrupt may amend his petition by adding the name of creditors omitted, and it is not necessary to give notice of such intended amendment.[42] This right to amend is recognized by the eleventh order in bankruptcy.[43] When a petition has been filed, it cannot be dismissed without notice to the creditors. This is required by paragraph "g" of section 59 of the act.

Involuntary Proceedings

Form 3 [44] provides for the case of an involuntary petition. Its first paragraph shows the jurisdictional facts—that is, the debtor's residence or place of business—and also contains the allegation that he owes debts to the amount of one thousand dollars, as required by section 4b of the bankrupt act. It must show his business also.[45] Its next paragraph shows that the petitioners or creditors have provable claims in excess of the securities held by them to the sum of five hundred dollars, which is the requisite prescribed by section 59b of the act. It then sets out the claims. The next paragraph alleges insolvency, where necessary, and charges an act of bankruptcy; stating the facts of the act of bankruptcy with sufficient certainty to enable proper defense to be made. It cannot merely follow the language of the statute.[46] It prays for a sub-

[42] In re Hill (D. C.) 5 Fed. 448. This decision was under the act of March 2, 1867 (14 Stat. 517, c. 176). Section 17 (3) of the present act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]) makes the discharge when granted bar all claims that have been duly scheduled in time for proof and allowance. Section 57n requires claims to be proved within one year from the adjudication. Hence an amendment so late as to deprive the creditor from sharing in the dividends or deny him a reasonable opportunity of proving his claim would be refused. In re Kittler (D. C.) 176 Fed. 655. *See "Bankruptcy," Dec. Dig. (Key-No.) § 44; Cent. Dig. §§ 43–46.*

[43] 172 U. S. 657, 18 Sup. Ct. v, 43 L. Ed. 1190.

[44] 172 U. S. 681, 18 Sup. Ct. xix, 43 L. Ed. 1208.

[45] In re Taylor, 102 Fed. 728, 42 C. C. A. 1. *See "Bankruptcy," Dec. Dig. (Key-No.) § 81; Cent. Dig. §§ 113–118.*

[46] In re Cliffe (D. C.) 94 Fed. 354; In re Nelson (D. C.) 98 Fed. 76. *See "Bankruptcy," Dec. Dig. (Key-No.) § 81; Cent. Dig. §§ 113–118.*

pœna, and that the debtor be adjudged a bankrupt, and is sworn to. It would not seem, under the language of the act, to be necessary to file any schedule with an involuntary petition at the outset, but the ninth order in bankruptcy [47] provides that, if the bankrupt is absent or cannot be found, the petitioning creditor must file, within five days after the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. The eleventh order in bankruptcy [48] allows these petitions also to be amended. The amendment may add additional grounds, and it may also make the averments of the petition more certain.[49]

Not every creditor of the bankrupt can file such petitions. By the fifty-ninth section of the act, this can be done only by those who have provable claims. Those who have preferences cannot prove their claims, except to the excess of the debt over the security. This is regulated by the fifty-seventh and fifty-ninth sections of the act.

The act as first passed provided that the claims of creditors who had received preferences should not be allowed unless such creditors should surrender their preferences. This, however, has been amended by the act of February 5, 1903, so that the present form of this paragraph provides that the claims of creditors who have received preferences voidable under section 60, subd. "b," or to whom conveyances, transfers, assignments, or incumbrances void or voidable under section 67, subd. "e," have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances.

[47] 172 U. S. 656, 18 Sup. Ct. v, 43 L. Ed. 1190.

[48] 172 U. S. 657, 18 Sup. Ct. v, 43 L. Ed. 1190.

[49] In re Mercur (D. C.) 95 Fed. 634; In re Nelson (D. C.) 98 Fed. 76; Ryan v. Hendricks, 166 Fed. 94, 92 C. C. A. 78; Millan v. Exchange Bank, 183 Fed. 753, 106 C. C. A. 327. *See "Bankruptcy," Dec. Dig. (Key-No.) § 84; Cent. Dig. §§ 126–129.*

Under this amendment, those who have valid preferences can prove their claims without being held to waive their preferences. Under the act of 1867 it had been held that a secured creditor who came into the proceeding and proved his claim waived his preference.[50]

A creditor of a partnership may prove against an individual member of the partnership, as that individual is still his debtor.[51]

If the petition shows the requisite number and amount of creditors and debts on its face, the court has jurisdiction, and the proceeding could not be attacked collaterally by showing that, as a matter of fact, these jurisdictional facts did not exist. Such a question would be for the bankrupt court itself, and could not be inquired into by another court where the proceedings on their face appear to be regular.[52] Paragraph "f" of the fifty-ninth section of the act allows creditors other than the original petitioners to enter their appearance at any time and join in the petition, or to file an answer, and be heard in opposition to the petition. If it develops on the examination of the question of fact that there is a deficiency of creditors, in number or amount, others who join in the petition under this provision can be counted, and the jurisdiction of the court will be upheld.[53]

In estimating the amount, interest may be included as part thereof.[54]

[50] In re Bear (D. C.) 5 Fed. 53. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 76, 364; Cent. Dig. § 504.*

[51] In re Mercur (D. C.) 95 Fed. 634. *See "Bankruptcy," Dec. Dig. (Key-No.) § 309; Cent. Dig. §§ 555–564.*

[52] In re Duncan, Fed. Cas. No. 4,131; In re Hecox, 164 Fed. 823, 90 C. C. A. 627; In re Dempster, 172 Fed. 357, 97 C. C. A. 51. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 21, 100; Cent. Dig. §§ 24, 141–144.*

[53] In re Romanow (D. C.) 92 Fed. 510; In re Bedingfield (D. C.) 96 Fed. 190; In re John A. Etheridge Furniture Co. (D. C.) 92 Fed. 329. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 76, 77; Cent. Dig. §§ 55, 99, 100.*

[54] Sloan v. Lewis, 22 Wall. 150, 22 L. Ed. 832. *See "Bankruptcy," Dec. Dig. (Key-No.) § 77; Cent. Dig. §§ 55, 101–108.*

A creditor who joins in the proceeding cannot defeat the proceeding by subsequently withdrawing.[55]

Under the provisions of the act, neither a voluntary nor involuntary petition can be dismissed, even by consent of parties, until after notice to the creditors.[56]

This provision, however, alludes only to dismissals of petitions before a hearing on the merits. No notice is required when the petition is dismissed by the court as the result of a trial.[57]

The only party defendant to the petition in the first instance is the alleged bankrupt. If there is a proceeding against him, and he is a member of a partnership, other members of the partnership cannot voluntarily come in and submit the partnership to the proceeding, as the act provides opportunity for them to avail of it by filing separate petitions.[58]

The petition must allege insolvency, except in cases where insolvency is not a material issue, and it must also charge an act of bankruptcy with reasonable certainty. This brings up for discussion the question, what constitutes acts of bankruptcy? Here it is important to remember that the acts of the bankrupt alone are being considered, and those simply for the purpose of deciding the question whether he should be adjudicated a bankrupt. There are many dealings by him which are acts of bankruptcy as far as he is concerned, and violations of the bankrupt law, and yet which are not voidable as to the grantees or beneficiaries under them. The bankrupt may intend to give a preference, for instance, and his act in

[55] In re Bedingfield (D. C.) 96 Fed. 190. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 77, 92.*

[56] Section 59g (U. S. Comp. St. 1901, p. 3445); In re Cronin (D. C.) 98 Fed. 584. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 48, 92; Cent. Dig. §§ 47, 133–136.*

[57] Neustadter v. Dry Goods Co. (D. C.) 96 Fed. 830. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 50, 99; Cent. Dig. §§ 136, 146.*

[58] Mahoney v. Ward (D. C.) 100 Fed. 278. *See "Bankruptcy," Dec. Dig. (Key-No.) § 88; Cent. Dig. §§ 58, 98–112.*

giving it will be an act of bankruptcy; and yet the grantee, if he has not the knowledge, or means of knowledge, required by the bankrupt law, may be enabled to sustain his preference. Hence at this stage of the proceeding, which involves simply the issue whether the defendant should be adjudicated a bankrupt, the question of the validity of his acts as to third parties is not involved. Those questions come up after adjudication, when proceedings are taken to set them aside.

ACTS OF BANKRUPTCY—DEFINITION AND ENUMERATION

40. Acts of bankruptcy are such acts as, in accordance with the terms of the statute, render him who commits them a subject for involuntary bankruptcy proceedings.

These acts, as specified in the third section of the act, may be enumerated as follows:

(a) Transfers to hinder, delay, and defraud creditors.
(b) Illegal preferences.
(c) Suffering preference by legal process.
(d) Assignments.
(e) Admission of insolvency in writing.

SAME—TRANSFERS TO HINDER, DELAY, AND DEFRAUD CREDITORS

41. It is an act of bankruptcy for a person to convey, transfer, conceal, or remove, or permit to be concealed or removed, any part of his property, with intent to hinder, delay, or defraud his creditors, or any of them. This is broader in meaning than the state statutes based on the statute of Elizabeth. Solvency is a good defense to a petition filed under this act of bankruptcy.

This subdivision makes an act of bankruptcy any attempt to defraud creditors which would constitute a violation of the state statutes based upon the statutes of Elizabeth. However, it goes further than this. At common law, independent of the bankrupt act, a preference of one creditor over another by a debtor was not a violation of such statutes, if the debt was an actual, bona fide debt; but, under the bankrupt act, even a preference of one bona fide creditor over another is held to be not only an act of bankruptcy, but void, as intended to hinder, delay, and defraud creditors; and not only a preference of one creditor over another, but a debt of general assignment, securing all creditors exactly alike, is held to be not only an act of bankruptcy, but void, as to the trustee in bankruptcy, as intended to hinder, delay, and defraud creditors; for its effect would be to withdraw the administration of the bankrupt's estate from the bankrupt court and place it in the hands of a trustee, and this would hinder the creditors from the collection of their debts through the court primarily designed for that purpose.[59]

A sale of property, however, is not necessarily fraudulent, though the vendor is insolvent. If made in the ordinary course of business, without circumstances of suspicion, it would be valid as to the vendee, and could hardly be considered an act of bankruptcy. Any contrary doctrine would put a clog upon the free alienation of property, which would be injurious in its effects upon the business community.[60] So, where a corporation issued bonds to

[59] WEST CO. v. LEA, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098; Gutwillig, In re (D. C.) 90 Fed. 475. An assignment, if perfected, is an act of bankruptcy, though invalid. Canner v. Webster Tapper Co., 168 Fed. 519, 93 C. C. A. 941; In re Federal Lumber Co. (D. C.) 185 Fed. 926. *See "Bankruptcy," Dec. Dig. (Key-No.) § 58; Cent. Dig. §§ 57, 72–79.*

[60] Tiffany v. Lucas, 15 Wall. 410, 21 L. Ed. 198; Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981; In re McLoon (D. C.) 162 Fed. 575. *See "Bankruptcy," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 57, 66, 69–79.*

take up its floated indebtedness, and conveyed its property in trust to secure them, with the idea of thereby placing itself in a better position to carry on its business, this could not be held to be an act of bankruptcy, though the corporation at the time might have been insolvent.[61]

This first act of bankruptcy does not add, as several of the others do, the qualification that the act must be done while insolvent. However, paragraph "c" of section 3 provides that it shall be a complete defense to any proceeding instituted under the first subdivision of the section to allege and prove that the party proceeded against was not insolvent, as defined in this act, at the time of filing the petition against him. In West Co. v. Lea[62] the Supreme Court decided that the subdivision in paragraph "c" referred simply to this provision relating to transfers to hinder, delay, and defraud creditors, and not to any of the others; hence, under this decision, solvency is a complete defense to a petition alleging such a conveyance by the debtor as is contemplated under this first subdivision.

SAME—ILLEGAL PREFERENCES

42. It is an act of bankruptcy for a person to transfer, while insolvent, any portion of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors. In this act of bankruptcy the intent of the debtor alone is material.

This act is described in section 3 as consisting of having "transferred while insolvent any portion of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors."

[61] In re Union Pac. R. Co., Fed. Cas. No. 14,376. *See "Bankruptcy," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 57, 66, 69–79.*

[62] 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098. *See "Bankruptcy," Dec. Dig. (Key-No.) § 54; Cent. Dig. §§ 54, 84, 85.*

In considering this as an act of bankruptcy, independent of the question how far it is voidable, the intent of the debtor alone is material. If he intended a preference, the fact that the creditor was not aware of such intent, or had not such reasonable cause to suspect it as to charge him with knowledge, will not affect the act as an act of bankruptcy, however good a defense it may be to an attempt to set it aside as to the creditor.[63] When a debtor transfers property to cover a debt, and its necessary effect is to give the creditor a preference, the intent to prefer will be inferred, as that is a natural consequence of the act.[64] Preferences of this sort may be accomplished as well by a payment in money as by a transfer of any other kind of property.[65]

It is to be noted that intent is necessary in both the acts of bankruptcy so far described.

SAME—SUFFERING PREFERENCES BY LEGAL PROCESS

43. It is an act of bankruptcy for a person to suffer or permit, while insolvent, any creditor to obtain a preference through legal proceedings, and not at least five days before a sale or final disposition of any property affected by such preference to vacate or discharge such preference.

As the policy of the bankrupt law is an equitable distribution of a bankrupt's estate among his creditors, it is

[63] In re Rome Planing Mill Co. (D. C.) 96 Fed. 812. *See "Bankruptcy," Dec. Dig. (Key-No.) § 58; Cent. Dig. §§ 57, 72–79, 83.*

[64] Johnson v. Wald, 93 Fed. 640, 35 C. C. A. 522; In re Smith (D. C.) 176 Fed. 426. *See "Bankruptcy," Dec. Dig. (Key-No.) § 58; Cent. Dig. §§ 57, 72–79, 83.*

[65] In re Ft. Wayne Electric Corp., 99 Fed. 400, 39 C. C. A. 582. But not an innocent payment in the usual course of business. In re Morgan & Williams (D. C.) 184 Fed. 938. *See "Bankruptcy," Dec. Dig. (Key-No.) § 58; Cent. Dig. §§ 57, 72–79, 83.*

necessary to secure it not only against the acts of the bankrupt himself, but also against the attempt of his creditors to secure priority over each other. This is the object of this section, and, being its object, it is an act of bankruptcy, if such a result is brought about by the creditors, though the bankrupt himself is not privy to their act, and merely suffers them to proceed. Under this section an intent of the debtor is unnecessary, which sharply distinguishes it from the two preceding sections, and also from the corresponding section of the bankrupt act of 1867. This clause of the act came under the consideration of the Supreme Court in Wilson v. Nelson.[66] There a debtor, long before the filing of a petition in bankruptcy, and indeed before the enactment of the bankrupt law, had given a creditor an irrevocable power of attorney to confess judgment upon a promissory note. After the bankrupt act went into effect, the creditor executed this power of attorney, and proceedings were instituted, alleging that the act of the debtor in permitting the execution of this power of attorney was an act of bankruptcy. The court sustained this contention, although the debtor had merely passively acquiesced, and in fact was powerless to do anything. The opinion was based upon the language of the present act, and distinguished cases decided under the old act, which it held were no longer in point. Prior to this decision, some decisions of inferior courts had held that in the case of a power of attorney given under similar circumstances, and afterwards executed, the act of the debtor in permitting it was not an act of bankruptcy, but these cases must now be considered as overruled.

Care must be taken, however, to distinguish this case from a procedure to foreclose a lien created before the act, or so long before the filing of the petition as not to

[66] 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147. *See "Bankruptcy," Dec. Dig. (Key-No.) § 59; Cent. Dig. §§ 81, 82.*

be subject to attack. In such case the fact that the lien is foreclosed afterwards does not make it an act of bankruptcy on the part of the debtor. The distinction is due to the fact that no lien arises at the time of giving a power of attorney to confess judgment, and the mere giving of that power of attorney does not enable a creditor to obtain a preference, as it may never be executed, whereas, in proceedings to foreclose a lien, the lien is already in existence, and the obtaining of the preference would date back to the time of executing the lien, and not, as in the case of a power of attorney, to the time of executing the power of attorney.[67] Under this clause, however, the mere appointment of a receiver for a corporation would not be an act of bankruptcy, as no final disposition of the property would be made by such appointment.[68] Creditors who wish to proceed under this section do not have to wait until an actual sale, or disposition of the property. If a sale has been advertised, they can proceed within five days before the advertisement is to be carried out.[69] No actual participation by the debtor is necessary, but mere passive submission is an act of bankruptcy under this clause, if the result is that the creditor secures the preference.[70]

[67] In re Chapman (D. C.) 99 Fed. 395; In re Ferguson (D. C.) 95 Fed. 429; METCALF BROS. v. BARKER, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122. *See "Bankruptcy," Dec. Dig. (Key-No.) § 59; Cent. Dig. §§ 81, 82.*

[68] In re Baker-Ricketson Co. (D. C.) 97 Fed. 489. *See "Bankruptcy," Dec. Dig. (Key-No.) § 59; Cent. Dig. §§ 81, 82.*

[69] In re Rome Planing Mill Co. (D. C.) 96 Fed. 812. An advertisement of a sale in attachment proceedings to save expense does not come under this provision, as it only substitutes money for property and does not diminish the debtor's estate. In re Crafts-Riordon Shoe Co. (D. C.) 185 Fed. 931. The title of the trustee is transferred to the proceeds. Jones v. Springer, 226 U. S. 148, 33 Sup. Ct. 64, 57 L. Ed. ——. *See "Bankruptcy," Dec. Dig. (Key-No.) § 59; Cent. Dig. §§ 81, 82.*

[70] In re Reichman (D. C.) 91 Fed. 624; In re Cliffe (D. C.) 94 Fed. 354; In re Tupper (D. C.) 163 Fed. 766, 772. *See "Bankruptcy," Dec. Dig. (Key-No.) § 59; Cent. Dig. §§ 81, 82.*

The language of this clause is conditioned upon the debtor not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such a preference. The privilege of vacating or discharging thus given to the debtor would seem, however, to be rather an empty one. If he goes and pays off the creditor and releases the property, and is insolvent when he does it, that would be an act of bankruptcy of itself. Hence, if he is actually insolvent, about the only thing he can do is to file a petition in bankruptcy himself; and this procedure is hinted at in the decisions.[71] But even that privilege cannot be exercised by some corporations, so that, if such a corporation is insolvent, nothing remains but to let matters take their course. Either an individual or a corporation can defend on the ground of solvency, if the facts sustain it, for in this subdivision insolvency is a necessary requisite.

SAME—ASSIGNMENTS AS AN ACT OF BANKRUPTCY

44. It is an act of bankruptcy for a person to make a general assignment for the benefit of his creditors, or, being insolvent, to apply for a receiver or trustee for his property, or when, because of insolvency, a receiver or trustee is put in charge of his property under the laws of a state, of a territory, or of the United States.

In the act as originally passed, any one committed an act of bankruptcy who made a general assignment for the benefit of his creditors. To this the amendment of Febru-

[71] WILSON v. NELSON, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147; In re Moyer (D. C.) 93 Fed. 188; In re Tupper (D. C.) 163 Fed. 766, 771. *See "Bankruptcy," Dec. Dig. (Key-No.) § 59; Cent. Dig. §§ 81, 82.*

ary 5, 1903, has added the following words: "or being insolvent applied for a receiver or trustee for his property, or because of insolvency, a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States."

Under the act of 1867, the mere making of a general assignment, though without preferences, was an act of bankruptcy, as it was evidence of an intent to prevent the administration of the debtor's property in the bankrupt court;[72] and the making of a general assignment is an act of bankruptcy, independent of any intent on the part of the debtor to defeat the operation of the law, and independent of the fact whether he is insolvent or not, for neither intent nor insolvency are specified as essentials under this clause as it stood in the original draft of the present act.[73] It has even been held that a paper purporting to be an assignment is an act of bankruptcy, though, as a matter of fact, it is invalid, and though it is a partnership assignment that does not convey individual property.[74]

In Rumsey & Sikemier Co. v. Novelty & Machine Mfg. Co.[75] it was held that, as the act applies only to general assignments, a debt which reserved a balance to the grantor after payment of creditors, if not in actual bad faith, or with no intent to evade the law, was not a general assignment, and did not contravene the act. This decision would seem subject to serious question. If it purported to be a conveyance of all the bankrupt's property to secure

[72] Boese v. King, 108 U. S. 379, 2 Sup. Ct. 765, 27 L. Ed. 760; WEST CO. v. LEA, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098. *See "Bankruptcy," Dec. Dig. (Key-No.) § 60; Cent. Dig. § 80.*

[73] WEST CO. v. LEA, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098. *See "Bankruptcy," Dec. Dig. (Key-No.) § 60; Cent. Dig. § 80.*

[74] In re Meyer, 98 Fed. 976, 39 C. C. A. 368. *See "Bankruptcy," Dec. Dig. (Key-No.) § 60; Cent. Dig. § 80.*

[75] (D. C.) 99 Fed. 699. This was overruled in the later case of In re Thomlinson Co., 154 Fed. 834, 83 C. C. A. 550. *See "Bankruptcy," Dec. Dig. (Key-No.) § 60; Cent. Dig. § 80.*

all his creditors, it is difficult to see how a mere reservation of any unused balance would prevent it from being a general assignment. However, creditors who prove their claims before the assignee, and participate in the benefit of the general assignment, could not come into court afterwards and allege such assignment as an act of bankruptcy.[76]

An application of a corporation under a state statute for a dissolution and the appointment of a receiver would not be a general assignment or an act of bankruptcy, under the language of the original act.[77]

In consequence of the decisions holding that the appointment of a receiver was not an act of bankruptcy under the original act, the amendment was introduced which has been set out above. Clearly, under it, the appointment of a receiver, either at the request of or against the wishes of the alleged bankrupt, is an act of bankruptcy, if such appointment is made on the ground of insolvency. Hence insolvency, while not an essential under the first part of this fourth clause as it now stands, is essential under the part added by the amendment. However, the appointment of a receiver on other grounds than insolvency would still not be an act of bankruptcy.[78]

[76] Simonson v. Sinsheimer, 95 Fed. 948, 37 C. C. A. 337; In re Romanow (D. C.) 92 Fed. 510; Moulton v. Coburn, 131 Fed. 201, 66 C. C. A. 90. *See "Bankruptcy," Dec. Dig. (Key-No.) § 76.*

[77] In re Empire Metallic Bedstead Co., 98 Fed. 981, 39 C. C. A. 372. *See "Bankruptcy," Dec. Dig. (Key-No.) § 60; Cent. Dig. § 80.*

[78] In re Edward Ellsworth Co. (D. C.) 173 Fed. 699; In re Hudson River Electric Co. (D. C.) 173 Fed. 934; Id., 183 Fed. 701, 106 C. C. A. 139, 33 L. R. A. (N. S.) 454; In re Electric Supply Co. (D. C.) 175 Fed. 612; In re Boston & Oaxaca Mining Co. (D. C.) 181 Fed. 422. The appointment of receivers of an insolvent corporation at its request is an act of bankruptcy, though unauthorized by law. Exploration Mercantile Co. v. Pacific Hardware & Steel Co., 177 Fed. 825, 101 C. C. A. 39. *See "Bankruptcy," Dec. Dig. (Key-No.) § 60; Cent. Dig. § 80.*

SAME—ADMISSION OF INSOLVENCY IN WRITING

45. It is an act of bankruptcy for a person to admit in writing his inability to pay his debts, and his willingness to be adjudged a bankrupt on that ground.

This act of bankruptcy is thus defined in the act, "admitted in writing his inability to pay his debts, and his willingness to be adjudged a bankrupt on that ground." The admission must be unqualified, and must be before the filing of the petition. For instance, a corporation which passed a resolution authorizing one of its officers to make this admission in the event of an involuntary petition in bankruptcy being filed against said company did not accomplish its purpose, for, under the language of the admission, it could not be made until the petition was filed, and, under the language of the bankrupt act, a petition could not be filed until it had made an admission in writing, and that admission had to be set out in the petition.[79]

It is an interesting question what officers of a corporation can make an admission of this sort, fraught with such far-reaching consequences. Under ordinary principles of corporation law, a board of directors has power to do anything necessary in carrying on the business of the company, but it has not power to take steps which might cause a dissolution of the company. Hence it has been held that, under the law of Massachusetts, this admission cannot be made by the board of directors, and that even a subsequent vote of the stockholders could not date back so as to make it valid.[80] Undoubtedly the stockholders

[79] In re Baker-Ricketson Co. (D. C.) 97 Fed. 489. *See "Bankruptcy," Dec. Dig. (Key-No.) § 61.*

[80] In re Bates Mach. Co. (D. C.) 91 Fed. 625. *See "Bankruptcy," Dec. Dig. (Key-No.) § 63.*

themselves could make or authorize such an admission, for they can wind up the corporation. The question depends largely upon the corporation laws of the different states. In Re Marine Machine & Conveyor Co.[81] an admission by the president and directors was held sufficient, though the question of their power to make it did not seem to have received any special attention.

TIME OF FILING PETITION

46. The petition must be filed within four months after the commission of the act of bankruptcy. Petitions must be made in duplicate, and both the original and duplicate must be filed within this period.

Where the act consists of having made a transfer with intent to defraud or to give a preference, or of having made a general assignment, the four months date from the recording of the paper, if it is a paper that requires record.[82] If the transfer or preference, however, is made by such an act or writing that it does not require record, the four months date from the time when the beneficiary takes notorious, exclusive, or continuous possession of the property,

[81] (D. C.) 91 Fed. 630. See, also, In re Rollins Gold & Silver Min. Co. (D. C.) 102 Fed. 982. See, as to powers of the board of directors and other officers, Cresson & Clearfield Coal & Coke Co. v. Stauffer, 148 Fed. 981, 78 C. C. A. 609; In re Quartz Gold Mining Co. (D. C.) 157 Fed. 243; Van Emon v. Veal, 158 Fed. 1022, 85 C. C. A. 547; In re Burbank Co. (D. C.) 168 Fed. 719; In re Southern Steel Co. (D. C.) 169 Fed. 702; In re American Guarantee & Security Co. of California (D. C.) 192 Fed. 405. The admission is sufficient to authorize an adjudication, though the corporation may not in fact be insolvent. In re Northampton Portland Cement Co. (D. C.) 179 Fed. 796. *See "Bankruptcy," Dec. Dig. (Key-No.) § 63.*

[82] The necessity of record and the question as to who are included under the term "creditors" depends upon the provisions of the local statute and its construction by the local courts. Holt v. Crucible Steel Co., 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756. *See "Bankruptcy," Dec. Dig. (Key-No.) § 79.*

unless petitioning creditors have received actual notice of such transfer or assignment. Under section 59c, petitions must be in duplicate; and accordingly it has been held that both the original and the duplicate must be filed within the four months, and that the failure to file the duplicate is not such an error as can be subsequently corrected under the eleventh order in bankruptcy.[83] The day on which the act of bankruptcy is committed is excluded in the computation of the time.[84] The four months date from the act of bankruptcy, not from the mere recording of any paper indirectly connected with it. Hence, where an insolvent corporation sold land, and used the proceeds to pay some of its creditors, and this use of the proceeds was attacked as a preference, it was held that the time ran from the date of the payments to the creditors, not from the date of recording the deed of sale of the land.[85]

[83] In re Stevenson (D. C.) 94 Fed. 110; In re Dupree (D. C.) 97 Fed. 28. But the requirement is waived by defending on other grounds. In re Plymouth Cordage Co., 135 Fed. 1000, 68 C. C. A. 434. A copy certified by the clerk and served on the bankrupt is a compliance with the statute. Millan v. Exchange Bank, 183 Fed. 753, 106 C. C. A. 327. *See "Bankruptcy," Dec. Dig. (Key-No.) § 79.*

[84] Id.

[85] In re Mingo Valley Creamery Ass'n (D. C.) 100 Fed. 282. *See "Bankruptcy," Dec. Dig. (Key-No.) § 79.*

CHAPTER VI

THE DISTRICT COURT (Continued)—BANKRUPTCY (Continued)

47. The Process on an Involuntary Petition.
48. The Warrant of Seizure.
49. The Appointment of a Receiver.
50. The Defense.
51. The Right to a Jury.
52. The Adjudication.
53. The Creditors' Meeting.
54. The Examination of the Bankrupt.

THE PROCESS ON AN INVOLUNTARY PETITION

47. The process in an involuntary proceeding consists of an order to show cause, as a preliminary, and service of a copy of the petition and a writ of subpœna upon the defendant. The subpœna is similar to the original equity subpœna, and its service is like that of the equity subpœna, except in certain respects specified by the statute.

In case personal service cannot be made, an order of publication is provided for, which is modeled upon the order prescribed in suits to enforce equitable claims.

Section 18a of the bankruptcy act of 1898 (30 Stat. 551, c. 541 [U. S. Comp. St. 1901, p. 3429]) provides that, upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days unless the judge shall, for cause, fix a longer time.

The original act went on to provide that, in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice of publication in suits in equity in courts of the United States.

The amendment of February 5, 1903 (32 Stat. 797, c. 487 [U. S. Comp. St. Supp. 1911, p. 1491]), changed this last clause by providing that this notice of publication shall be given in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication, unless the judge shall, for cause, fix a longer time.

Under this provision the first process on an involuntary petition is an order to show cause, providing also that a copy of the petition and a writ of subpœna be served upon the defendant. A form of such an order to show cause is given as form 4 [1] of those prescribed by the Supreme Court of the United States, and the subpœna as No. 5 [2] of the same forms. This subpœna is not in the exact form of the original equity subpœna, and the act does not require it to be, but merely requires that its service shall be like that of the equity subpœna, except in the particulars named.[3] This subpœna must be issued, and cannot be waived by the bankrupt. He can accept service on it, but he cannot stop its issue. This is for the reason that creditors also can contest an involuntary petition, and the issuance of the

[1] 172 U. S. 682, 18 Sup. Ct. xx, 43 L. Ed. 1209.

[2] 172 U. S. 683, 18 Sup. Ct. xx, 43 L. Ed. 1209.

[3] A service on an adult member of the bankrupt's family in case of his absence is a personal service in the sense of and under the provisions of equity rule 13 (29 Sup. Ct. xxvi). In re Norton (D. C.) 148 Fed. 301. *See "Bankruptcy," Dec. Dig. (Key-No.) § 86.*

subpœna is necessary in order to fix a return day within which creditors can contest.[4] In case the subpœna is not served, the court can order an alias.[5]

The Order of Publication

In case personal service cannot be made, an order of publication can be had as prescribed by the act. This order of publication is modeled upon the order prescribed in suits to enforce equitable liens. Section 738 of the Revised Statutes first provided for service by publication in such cases, but its provisions were enlarged and practically superseded by the act of March 3, 1875.[6] It provides, in substance, that, when personal service cannot be made, "it shall be lawful for the court to make an order directing such absent defendant, or defendants, to appear, plead, answer or demur, by a day certain to be designated." No form of an order of publication is given among those prescribed by the Supreme Court. Such an order would be a simple one, and need only follow the statute. The following is suggested as a form for the purpose:

"It appearing that personal service cannot be made upon the defendant herein, it is ordered that said defendant do appear, plead, answer, or demur to the petition within ten days from the last publication hereof, at, in the District of; and it is further ordered that this order be published in the, a newspaper published in the, of, in, District of, where this suit is pending, on the day of and the day of"

[4] In re L. Humbert Co. (D. C.) 100 Fed. 439. But the failure to issue the subpœna on account of such waiver does not affect the validity of the adjudication as to any except creditors who did not acquiesce in it or who desire to make defense to the petition. In re Western Inv. Co. (D. C.) 170 Fed. 677. *See "Bankruptcy," Dec. Dig. (Key-No.) § 87.*

[5] Gleason v. Smith, 145 Fed. 895, 76 C. C. A. 427. *See "Bankruptcy," Dec. Dig. (Key-No.) § 86.*

[6] U. S. Comp. St. 1901, p. 513, now section 57 of the Judicial Code.

THE WARRANT OF SEIZURE

48. If, through danger of dissipation of the property, a necessity appears therefor, it is provided that an order may issue for the seizure of the property on behalf of the court, on satisfactory affidavits having been given, with bond.

The petitioning creditors may simply issue and serve the notice above, without any interference with the property of the defendant bankrupt. If, however, they believe that there is danger of its dissipation, they are permitted, by section 69a of the act, on satisfactory proof by affidavit that the bankrupt has neglected, or is neglecting, or is about to so neglect his property that it has thereby deteriorated, or is thereby deteriorating, or is about thereby to deteriorate in value, to apply to the judge for a warrant to the marshal to seize and hold it subject to further orders, and the judge is authorized to issue such a warrant. In such case a bond must be given to indemnify the bankrupt for any damages inflicted. This provision evidently contemplates such a procedure after the filing of the petition, and requires at least a prima facie case to be made by affidavit. The bond prescribed by it and by section 3e of the act is only in case it is desired before adjudication to protect the property, as is evident from the language of these two sections. After adjudication the court has constructive custody of the property, and in such case it can proceed by summary process to take charge of the property, without requiring a bond.[7]

This warrant to the marshal authorizes the seizure not only of property in the hands of the bankrupt himself, but

[7] BRYAN v. BERNHEIMER, 181 U. S. 188, 195, 21 Sup. Ct. 557, 45 L. Ed. 814. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 109, 288.*

also of property claimed to be his that may be found in other hands.[8]

This fact, however, should not be allowed to confuse the procedure under the involuntary petition with the summary procedure to gain possession of the property. The only proper issue in the involuntary petition itself is whether the bankrupt has committed an act of bankruptcy. That is the only issue which the law contemplates as being tried upon that petition, and it would be bad practice to combine in the same petition a proceeding against third parties. That should be raised by an additional petition to the court, or rule to show cause, so as to keep the two issues entirely separate.[9]

Under such a warrant the marshal may be directed to take charge of property in the hands of an assignee under a general assignment, as the bankruptcy act supersedes proceedings of this sort in state courts under state insolvent laws.[10]

The Supreme Court has held that where there has been an adjudication in bankruptcy, but a trustee has not been appointed, the bankrupt court could retake the property by summary process, on petition, out of the hands of parties who had replevied the property in the bankrupt's possession after the adjudication. The court, however, bases this right rather upon subdivision 15 of section 2, allowing the courts to make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act, and upon clause 3 of bankruptcy order

[8] BRYAN v. BERNHEIMER, 181 U. S. 188, 195, 21 Sup. Ct. 557, 45 L. Ed. 814. *See "Bankruptcy," Dec. Dig. (Key-No.) § 116.*

[9] In re Kelly (D. C.) 91 Fed. 504. *See "Bankruptcy," Dec. Dig (Key-No.) § 116.*

[10] In re Sievers (D. C.) 91 Fed. 366; Davis v. Bohle, 92 Fed. 325, 34 C. C. A. 372; Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814. *See "Bankruptcy," Dec. Dig. (Key-No.) § 116.*

12,[11] than upon the clause authorizing the order of seizure.[12]

This warrant can also be used to compel the agent of the bankrupt, who has bankrupt money in his possession and asserts no adverse claim, to deliver the money to a proper custodian. In such case a mere refusal to surrender the money does not constitute an adverse claim, and the party holding it can be proceeded against by a rule to show cause.[13]

This principle, however, does not interfere with the general principle of comity of courts. If a state court has possession of bankrupt's property to enforce a lien created not against the provisions of the bankrupt act, and is proceeding to enforce that lien, the bankrupt court will not dispossess it merely because the final judgment enforcing the lien may come within the four months named in section 67 of the bankrupt act.[14]

THE APPOINTMENT OF A RECEIVER

49. Further provision is made for the protection of the bankrupt estate in the allowance of a receiver for this purpose when necessity therefor is shown. But this step is by no means a matter of course, and the exercise of the power should be carefully guarded.

[11] 172 U. S. 657, 18 Sup. Ct. vi, 43 L. Ed. 1190.

[12] White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183. *See "Bankruptcy," Dec. Dig. (Key-No.) § 211.*

[13] Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. As to the issue of summary process, see In re Brodbine, 93 Fed. 643; Mound Mines Co. v. Hawthorne, 173 Fed. 882, 97 C. C. A. 394. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 116, 211.*

[14] METCALF BROS. v. BARKER, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 156, 211.*

Section 2, subd. 3, of the act, allows the courts to appoint receivers, or the marshals, upon the application of the parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of a petition, and until it is dismissed or the trustee is qualified. The cautious language of this clause shows that such a receiver is by no means a matter of course, and that the exercise of this power should be carefully guarded.[15] The receiver is intended mainly as a curator or temporary custodian of the property.

The act of 1867, though it did not contain any express provision allowing the appointment of a receiver, was construed as authorizing their appointment in cases where they were necessary, though the courts held them to be mere receivers to hold with limited powers.[16] Nor would they be appointed unless it appeared that the probabilities of the case were in favor of the complainant.[17]

Under the present act, the decisions have given them more extended powers than that of mere custodians. They may be appointed not only for the purpose of holding the property of the bankrupt, but of stopping the dissipation of the property by a grantee alleged to hold it illegally, and for that purpose may not only hold the property that they get possession of without suit, but may proceed in the courts to protect property alleged to belong to the bankrupt. This was expressly decided as to the powers of a receiver in Re Fixen,[18] and would seem to follow necessari-

[15] T. S. Faulk & Co. v. Steiner, Lobman & Frank, 165 Fed. 861, 91 C. C. A. 547; In re Standard Cordage Co. (D. C.) 184 Fed. 156. *See "Bankruptcy," Dec. Dig. (Key-No.) § 114.*

[16] Lansing v. Manton, Fed. Cas. No. 8,077. *See "Bankruptcy," Dec. Dig. (Key-No.) § 114; Cent. Dig. §§ 164–166.*

[17] Wilkinson v. Dobbie, Fed. Cas. No. 17,670. *See "Bankruptcy," Dec. Dig. (Key-No.) § 114; Cent. Dig. §§ 164–166.*

[18] (D. C.) 96 Fed. 748. This decision is questioned in Guaranty Title & Trust Co. v. Pearlman (D. C.) 144 Fed. 550, but the better

ly from the language of the court in Bryan v. Bernheimer.[19] The latter case was a proceeding by the marshal, but the principle is the same.

The decisions conflict on the question whether a receiver can sue outside the district of his appointment. Some hold that he cannot, but may apply for temporary relief in another district till the appointment of a trustee.[20]

But the better view is that a bankrupt proceeding is not bounded by district or state lines, and that its receiver is a statutory receiver and may sue anywhere.[21]

He may take property, though in charge of a state insolvent court.[22]

And if the property is of such a nature as to render it necessary, he may sell it.[23]

THE DEFENSE

50. The defense is set up by the bankrupt or by a creditor by means of a demurrer, plea, or answer; the questions generally raised being that of the jurisdiction, or whether there can be an adjudication in bankruptcy; the creditors being allowed to make only such defenses as could be set up by the bankrupt.

opinion is in accord with it. See In re Dempster, 172 Fed. 353, 97 C. C. A. 51. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 114, 115; Cent. Dig. §§ 164–166.*

[19] 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 114, 115; Cent. Dig. §§ 164–166.*

[20] In re Schrom (D. C.) 97 Fed. 760; In re Dunseath & Son Co. (D. C.) 168 Fed. 973. *See "Bankruptcy," Dec. Dig. (Key-No.) § 115; Cent. Dig. § 165.*

[21] In re Dempster, 172 Fed. 353, 97 C. C. A. 51. *See "Bankruptcy," Dec. Dig. (Key-No.) § 115; Cent. Dig. § 165.*

[22] In re John A. Etheridge Furniture Co. (D. C.) 92 Fed. 329. *See "Bankruptcy," Dec. Dig. (Key-No.) § 115; Cent. Dig. § 165.*

[23] In re Becker (D. C.) 98 Fed. 407; In re Desrochers (D. C.) 183 Fed. 991. *See "Bankruptcy," Dec. Dig. (Key-No.) § 115; Cent. Dig. § 165.*

Section 18b of the bankrupt act provides that the bankrupt or any creditor may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow. The amendment of February 5, 1903, has reduced this ten days to five days. It is apparent, therefore, that the defense may be made either by the bankrupt himself or by a creditor; and for this reason, as stated above, a subpœna must issue so as to fix the time within which the creditor can appear.[24]

The fact, however, that a creditor may also defend, does not give him the right to raise any issue that the bankrupt could not raise. On the original petition the validity of transfers, as far as the creditor is concerned, is not involved. When he defends he simply stands in the shoes of the bankrupt, and sets up such defense as the bankrupt alone could set up.[25] Assuming that the jurisdictional facts are all made out, practically the only issue that the bankrupt or a creditor can raise on the petition itself is whether an act of bankruptcy has been committed. This is clear from the language of many clauses in the act. For instance, section 18d speaks of the bankrupt or any of his creditors appearing within the time limited and controverting "the facts alleged in the petition." Section 59b provides that the prayer of the petition is "to have him adjudged a bankrupt," and section 59f adds a provision that creditors other than the original petitioners may "be heard in opposition to the prayer of the petition"; thus showing that, when creditors appear, they can only resist the adjudication in bankruptcy, and cannot raise questions as to the validity of conveyances to them, or other questions personal to them. There are other means provided for raising these questions.

[24] In re L. Humbert Co. (D. C.) 100 Fed. 439. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 86, 87; Cent. Dig. §§ 130–155.*

[25] Sinsheimer v. Simonson, 107 Fed. 898, 47 C. C. A. 51; Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413. *See "Bankruptcy," Dec. Dig. (Key-No.) § 89.*

As to the form of the defense, the provision that the bankrupt or any creditor may appear and plead is not to be construed literally, as meaning that the form of the defense must be a plea. Section 19a provides that a person against whom an involuntary petition has been filed shall be entitled to a jury trial on filing a written application therefor "at or before the time within which an answer may be filed." Section 59f provides that creditors other than original petitioners may at any time enter their appearance and join in the petition, "or file an answer and be heard in opposition to the prayer of the petition." It is clear, therefore, that the word "plead" is merely equivalent to "making defense," and that the form of defense may be according to the ordinary rules of pleading; that is, by plea, demurrer, or answer.

Form 6 of those prescribed by the Supreme Court [26] can be followed in most cases, and is sufficient, but this does not prevent a more elaborate defense and a setting up of other matters.[27] In fact, this form could not possibly answer for many defenses that might be made, as, for instance, the question whether the requisite number of creditors have joined, and whether their debts aggregate the right amount.

THE RIGHT TO A JURY

51. The bankrupt is given the right to a jury upon the question of his insolvency and the question whether he has committed an act of bankruptcy, provided he files a written application therefor at or before the time within which an answer may be filed.

[26] 172 U. S. 684, 18 Sup. Ct. xxi, 43 L. Ed. 1209.

[27] Mather v. Coe (D. C.) 92 Fed. 333; In re Paige (D. C.) 99 Fed. 538. *See "Bankruptcy," Dec. Dig. (Key-No.) § 89; Cent. Dig. §§ 120–122.*

This means a jury trial according to the course of the common law, not a mere issue out of chancery, and hence proceedings on a trial are reviewable only by writ of error and on bills of exceptions, where bills of exceptions are usually necessary.[28]

Ordinarily the burden of proof is upon the creditors to make out the facts charged in the petition.[29] Section 3, "c" and "d," however, provides that the burden of proving solvency shall be upon the bankrupt when that is set up as a defense to the charge that the bankrupt has attempted to hinder, delay, or defraud his creditors, or when he fails to appear with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, on a charge of making an illegal preference, or suffering or permitting one.

As the trial is according to the course of the common law, this means that the evidence will be taken before the jury in open court, except in cases where it can be taken by deposition under the present rules of common-law practice in the federal courts.

The bankrupt is entitled to a jury trial only on the issue of insolvency and the commission of an act of bankruptcy. The submission of any other questions to a jury is discretionary with the court.[30]

[28] ELLIOTT v. TOEPPNER, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200. But this is not true as to questions submitted to a jury under the general powers of the court, and not under the provisions of the bankrupt act. The verdict in such case is only advisory. In re Neasmith, 147 Fed. 160, 77 C. C. A. 402. *See "Bankruptcy," Dec. Dig. (Key-No.) § 93; Cent. Dig. § 140.*

[29] In re Rome Planing Mill Co. (D. C.) 96 Fed. 812; In re Taylor, 102 Fed. 728, 42 C. C. A. 1. *See "Bankruptcy," Dec. Dig. (Key-No.) § 91; Cent. Dig. §§ 137–139.*

[30] Carpenter v. Cudd, 174 Fed. 603, 98 C. C. A. 449, 20 Ann. Cas. 977; Stephens v. Merchants' Nat. Bank of Aurora, Ill., 154 Fed. 341, 83 C. C. A. 119. *See "Bankruptcy," Dec. Dig. (Key-No.) § 93; Cent. Dig. § 140.*

THE ADJUDICATION

52. The next step in the progress of a bankruptcy case, if the issue raised on the petition is decided against the bankrupt, is the adjudication.

In case of a voluntary petition this is a matter of course.[31] In case of an involuntary petition it is a matter of course if the issues are decided against the bankrupt, and it is also a matter of course if the bankrupt makes no defense.[32] If the judge is present, the adjudication is made by him. If he is absent from the district or the division of the district in which the petition is filed, the clerk refers the case to the referee, and the referee on such reference can make the adjudication.[33] The order of reference, therefore, when made by the clerk, is made before adjudication, and for the purpose of enabling the referee to make the adjudication. When made by the judge, it is after adjudication, and for the purpose of investing the referee with the general supervision of the case in its details, which the bankruptcy act contemplates. The things required to be stated in the order are set out in bankruptcy order 12,[34] and its form constitutes No. 14[35] and No. 15[36] of the forms prescribed by the Supreme Court.

[31] Bankr. Act, § 18g; HANOVER NAT. BANK v. MOYSES, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113. *See "Bankruptcy," Dec. Dig. (Key-No.) § 51.*

[32] Bankr. Act, § 18e.

[33] Bankr. Act, §§ 18e–g, 38a (1).

[34] 172 U. S. 657, 18 Sup. Ct. vi, 43 L. Ed. 1190.

[35] 172 U. S. 690, 18 Sup. Ct. xxv, 43 L. Ed. 1212.

[36] 172 U. S. 690, 18 Sup. Ct. xxv, 43 L. Ed. 1212.

THE CREDITORS' MEETING

53. The first important step after the adjudication is the meeting of creditors. The thirty-ninth section of the act requires the referee to give the notice of such meeting, and the fifty-eighth section requires at least ten days' notice by mail, and also by publication. The proceedings at a creditors' meeting are prescribed by the fifty-fifth section of the act. The judge or referee presides, and the important business before the meeting is the allowance or disallowance of claims of creditors, the examination of the bankrupt, and the election of a trustee.

Proof of Claims

The proof and allowance of claims are regulated by the fifty-seventh section of the act, which has been amplified by bankruptcy order 21.[87] The proof is under oath; must specify the claim, the consideration, the payments, the securities held therefor, if any, and that the same is justly owing. Creditors are defined in the first section of the act as including any one who owns a demand or claim provable in bankruptcy, and may include a duly authorized agent, attorney, or proxy. Hence only those creditors whose claims are provable in bankruptcy are included. The claims which are provable are set out in the sixty-third section of the act. The bankrupt himself, as fiduciary, can prove a claim against his estate.[88]

Under the present act, secured creditors and those who have priority can prove their claims and participate in the meeting, but only for such part of their debt as is not cov-

[87] 172 U. S. 660, 18 Sup. Ct. vii, 43 L. Ed. 1192.

[88] Warner v. Spooner (C. C.) 3 Fed. 890. *See "Bankruptcy," Dec. Dig. (Key-No.) § 308; Cent. Dig. § 490.*

ered by their securities. And "secured creditors," in this sense, mean creditors secured by the bankrupt, not creditors secured by claims against other parties. For instance, where a creditor had a judgment against the bankrupt and another, and levied on the property of the other as well, he could still prove his claim against the bankrupt.[39] And so a partner who has bought up judgments against the firm can prove against the estate of an individual partner, though not in such a manner as to come into competition with partnership debts on which he himself would be responsible.[40]

Under section 57g of the act as first passed, the claims of creditors who have received preferences could not be allowed unless such creditors surrendered their preferences. It will appear hereafter, in discussing the question what preferences are voidable, that a transfer or other method of preference adopted by the bankrupt may be a preference as to him, and yet may be valid as to the party preferred, if the latter did not have reasonable cause to believe that it was intended as a preference. Hence care must be taken, in this connection, to distinguish between preferences voidable even as to the creditor, and preferences valid as to him, and yet against the bankrupt law. The idea of the bankrupt law is equality of distribution of the assets among the creditors, as far as it is possible to bring about that equality without interfering with freedom of alienation in ordinary business transactions. Hence this provision of the bankrupt law was intended to put the creditor to his election. He had to choose between holding on to his preference, or giving up his hope of dividends

[39] In re Headly (D. C.) 97 Fed. 765; Board of Com'rs of Shawnee County, Kan., v. Hurley, 169 Fed. 92, 94 C. C. A. 362. *See "Bankruptcy," Dec. Dig. (Key-No.) § 310; Cent. Dig. §§ 501–507.*

[40] In re Carmichael (D. C.) 96 Fed. 594. *See "Bankruptcy," Dec. Dig. (Key-No.) § 309; Cent. Dig. §§ 555–564.*

from the bankrupt's estate. He could not claim his preference, and still insist on his dividend. Hence, under the act, as first passed, even a creditor whose preference could not be set aside had to surrender it before he could participate in the benefits of the act.[41] And Judge Lowell held that even a preference which could not be set aside for the reason that it had been made for more than four months had to be surrendered before the creditor could prove his claim.[42] In other words, under the original act, if the result of a payment or transfer was a preference, that preference had to be surrendered before the creditor could claim under the bankruptcy proceeding. However, the amendment of February 5, 1903, changed section 57g of the original act so as to provide that the claims of creditors who have received preferences voidable under section 60, subd. "b," or to whom conveyances, transfers, assignments or incumbrances, void or voidable under section 67, subd. "e," have been made or given, shall not be allowed, unless such creditors shall surrender such preference, conveyances, transfers, assignments, or incumbrances. This amendment was evidently intended to change these decisions, and to allow creditors who had received a preference innocently to still hold on to their preference and prove their claim. For it must be remembered that the receipt of a preference is not considered as an actual fraud.[43] Here, too, the preference contemplated is a preference by the bankrupt. A

[41] In re Fixen, 102 Fed. 295, 42 C. C. A. 354, 50 L. R. A. 605; Pirie v. Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171. *See "Bankruptcy," Dec. Dig. (Key-No.) § 311; Cent. Dig. §§ 497–500.*

[42] In re Jones (D. C.) 110 Fed. 736. But compare In re Chaplin, 115 Fed. 162, 171. *See "Bankruptcy," Dec. Dig. (Key-No.) § 311; Cent. Dig. §§ 497–500.*

[43] Streeter v. Jefferson County Nat. Bank, 147 U. S. 36, 13 Sup. Ct. 236, 37 L. Ed. 68; Keppel v. Tiffin Saving Bank, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790; Page v. Rogers, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332. *See "Bankruptcy," Dec. Dig. (Key-No.) § 311; Cent. Dig. §§ 497–500.*

payment to the creditor by a third party is not a preference.[44]

There have been a number of decisions on the question whether payments on running accounts constitute a preference or not. It will appear, as the result of the authorities, that where there is an account current, with goods being bought and payments being made right along, payments on running accounts which do not substantially diminish the debtor's assets and are substantially covered by additional purchases are not preferences, but payments which do substantially diminish the assets are preferences.[45]

Paragraph "i" of section 57 permits parties liable to the creditor secondarily to the bankrupt to prove the claim in the creditor's name, and be subrogated to his rights, if the creditor fails to prove it. However, when there is only a part payment, the claim cannot be proved by the surety, but must be proved by the creditor.[46] And in such case the surety stands in the shoes of the creditor, and can only prove the claim if the creditor could, so that, if the creditor is prevented by a preference from proving his claim, the surety cannot prove it.[47]

Under this section a partner who had sold out his interest in the firm under an agreement that the remaining partner should assume all the firm debts, and who has been held liable for one of these debts, practically occupies the

[44] Dressel v. North State Lumber Co. (D. C.) 119 Fed. 531. *See "Bankruptcy," Dec. Dig. (Key-No.) § 311; Cent. Dig. §§ 497–500.*

[45] Pirie v. Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171; JAQUITH v. ALDEN, 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717; Joseph Wild & Co. v. Provident Life & Trust Co., 214 U. S. 292, 29 Sup. Ct. 619, 53 L. Ed. 1003. *See "Bankruptcy," Dec. Dig. (Key-No.) § 311; Cent. Dig. §§ 497–500.*

[46] In re Heyman (D. C.) 95 Fed. 800; Sessler v. Paducah Distilleries Co., 168 Fed. 44, 93 C. C. A. 466. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 311, 316; Cent. Dig. §§ 497–500.*

[47] In re Schmechel Cloak & Suit Co. (D. C.) 104 Fed. 64. *See "Bankruptcy," Dec. Dig. (Key-No.) § 311; Cent. Dig. §§ 497–500.*

position of surety, and can prove such a claim, though not so as to come into competition with debts for which he might personally be liable.[48]

The Debts Provable against a Bankrupt's Estate

All debts which are in existence as of the date of filing the petition are provable against the estate.[49] The debts provable are enumerated [50] as those which are a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as are not payable and did not bear interest. Under this clause the right to prove a debt depends upon its nature, and not upon the probability of realizing anything out of it.[51]

There is a conflict of decisions whether a judgment in a state court for a fine in a criminal case comes under this section or not. District Judge Jackson, of West Virginia, has held that it comes within the terms of this clause and is provable.[52] On the other hand, District Judge Evans, of Kentucky, has held that such a debt is not provable; going on the theory that, if provable, it is barred by a discharge, and that it could not have been the intent of Congress to practically confer upon any one but the state officials what would be substantially a pardoning power.[53] Notwith-

[48] In re Dillon (D. C.) 100 Fed. 627. *See "Bankruptcy," Dec. Dig. (Key-No.) § 309; Cent. Dig. §§ 555–564.*

[49] In re Burka (D. C.) 104 Fed. 326; In re Reading Hosiery Co. (D. C.) 171 Fed. 195; Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. —. *See "Bankruptcy," Dec. Dig. (Key-No.) § 314.*

[50] Section 63.

[51] In re Bates (D. C.) 100 Fed. 263. *See "Bankruptcy," Dec. Dig. (Key-No.) § 314.*

[52] In re Alderson (D. C.) 98 Fed. 588. *See "Bankruptcy," Dec. Dig. (Key-No.) § 315; Cent. Dig. §§ 488, 491.*

[53] In re Moore (D. C.) 111 Fed. 145. In the later cases of In re Southern Steel Co. (D. C.) 183 Fed. 498, and In re York Silk Mfg. Co. (D. C.) 188 Fed. 735, it was held that claims for penalties im-

standing the force of this objection, such a debt would certainly come under the language of this clause, as being a fixed liability evidenced by a judgment; and, when the language of the act is so clear, it would hardly seem necessary to go outside of its language.

A liability which is in existence at the time of the filing of the petition and becomes fixed thereafter can be proved, provided it is done within the one year allowed for proof of claims.[54]

In the case of an agreement by a party to pay an annuity, a given penalty being fixed in the agreement, the holder of the annuity can prove this as a debt to the amount of the penalty if the annuity calculated on the usual life tables equals or exceeds the penalty.[55]

In case of a nonnegotiable instrument which has been assigned, the assignee stands in the shoes of the assignor, and can only prove for such an amount as the assignor could prove.[56]

A claim for alimony based upon a decree allowing it is not provable against the estate. It is not supposed to arise out of contract, and it is not a fixed liability in the sense of the statute.[57]

The next largest class of debts enumerated are those founded upon a contract, express or implied. A claim founded upon a contract must, however, at least be certain.

posed under state laws were not provable debts, but apparently the claims considered in those cases had not been reduced to judgment. *See "Bankruptcy," Dec. Dig. (Key-No.) § 315; Cent. Dig. §§ 488, 491.*

[54] In re Gerson (D. C.) 105 Fed. 891; Moch v. Bank, 107 Fed. 897, 47 C. C. A. 49; In re Lyons Beet Sugar Refining Co. (D. C.) 192 Fed. 445. *See "Bankruptcy," Dec. Dig. (Key-No.) § 314.*

[55] Cobb v. Overman, 109 Fed. 65, 48 C. C. A. 223, 54 L. R. A. 369. *See "Bankruptcy," Dec. Dig. (Key-No.) § 316; Cent. Dig. §§ 474–477.*

[56] In re Wiener & Goodman Shoe Co. (D. C.) 96 Fed. 949. *See "Bankruptcy," Dec. Dig. (Key-No.) § 314.*

[57] Audubon v. Shufeldt, 181 U. S. 575, 21 Sup. Ct. 735, 48 L. Ed. 1009. See, also, Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 737, 47 L. Ed. 1084. *See "Bankruptcy," Dec. Dig. (Key-No.) § 315.*

For instance, a claim for breach of warranty due to an outstanding dower interest, when both husband and wife are still living, is too contingent to be made the subject of a provable claim, though a claim for breach of warranty actually matured is not.[58]

The fifth subdivision of this paragraph allows provable debts to be reduced to judgment after the filing of the petition, and before the consideration of an application for a discharge. The effect of a judgment, however, is not to create any lien, but simply to establish the debt.[59] Hence under this act the mere suggestion of bankruptcy is not sufficient to stop proceedings in a state court on a provable claim, as such claim can still be prosecuted to judgment.

The last clause of the sixty-third section provides that unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct. If they come within the class of provable claims, they may be the basis of an involuntary proceeding, though not reduced to judgment.[60]

Under this provision, claims arising out of contract, whose amount is not fixed, must be liquidated under the direction of the court. Where the result of bankruptcy is to put an end to a continuing contract, damages for failing to complete such an executory contract up to the date of filing the petition can be proved.[61]

Damages arising out of a tort—as, for instance, an as-

[58] Riggin v. Magwire, 15 Wall. 549, 21 L. Ed. 232; In re Morales (D. C.) 105 Fed. 761. See, also, Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084. *See "Bankruptcy," Dec. Dig. (Key-No.) § 318; Cent. Dig. §§ 481, 482.*

[59] In re McBryde (D. C.) 99 Fed. 686. *See "Bankruptcy," Dec. Dig. (Key-No.) § 319; Cent. Dig. §§ 491, 492.*

[60] Frederic L. Grant Shoe Co. v. W. M. Laird Co., 212 U. S. 445, 29 Sup. Ct. 332, 53 L. Ed. 591. *See "Bankruptcy," Dec. Dig. (Key-No.) § 320; Cent. Dig. §§ 479, 480.*

[61] In re Silverman (D. C.) 101 Fed. 219; In re Stern, 116 Fed. 604, 54 C. C. A. 60. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 318, 320.*

sault and battery—must be liquidated before they can be proved, if they are provable at all.[62]

Damages are so provable if they arise out of contract, even though the form of the action may be ex delicto. For instance, damages for a breach of contract of marriage are provable.[63]

But in Re Hirschman,[64] District Judge Marshall decides that debts which are in their nature torts are not provable against the bankrupt's estate at all. He holds that the only debts provable are those named in section 63a of the act, all of which arise out of contract, in some form or another, and that the concluding clause of that same section, allowing the liquidation of unliquidated claims, simply refers to the claims provable under the first section, and is not intended to enlarge the list of debts which could be proved beyond those enumerated in the first section.

Debt Barred by Statute of Limitations

There has been a good deal of discussion, both under the former act and the present one, as to the circumstances under which a debt barred by the statute of limitations may be proved. It may be considered settled by the preponderance of authority, at least, that the bar of the limitation is applied as of the district of the debtor's residence at the time of adjudication.[65] And the better opinion, also,

[62] In re Hirschman (D. C.) 104 Fed. 69. *See "Bankruptcy," Dec. Dig. (Key-No.) § 320; Cent. Dig. §§ 479, 480.*

[63] In re Fife (D. C.) 109 Fed. 880; In re Warth (D. C.) 196 Fed. 571. *See "Bankruptcy," Dec. Dig. (Key-No.) § 318.*

[64] (D. C.) 104 Fed. 69. This view is taken also by Judge Grubb in In re Southern Steel Co. (D. C.) 183 Fed. 498. He bases his holding largely upon an intimation of Mr. Justice Peckham in Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084. But in the later case of Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, the question is expressly reserved. *See "Bankruptcy," Dec. Dig. (Key-No.) § 320; Cent. Dig. §§ 479, 480.*

[65] In re Noesen, Fed. Cas. No. 10,288; In re Cornwall, Fed. Cas. No. 3,250. *See "Bankruptcy," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 473.*

is that, if not barred at the date of adjudication, it cannot be barred at all during the pendency of the proceedings—in other words, the filing of a proceeding in bankruptcy stops the running of the statute.[66] It is settled, also, that, although the plea of the statute of limitations is usually a personal plea, yet, in a bankruptcy proceeding, where creditors are equally interested, any creditor may plead it, or may require the trustee to plead it. And the insertion of the barred debt in the bankrupt's petition does not revive it.[67]

In spite of the language of the authorities, however, it is difficult to understand why a debt barred by the statute of limitations is not a provable debt. It would seem, on principle, that this would depend on the policy of the special statute which is under consideration. In some states the statute of limitations destroys both the contract and the remedy; in others, it merely takes away the remedy, and the debt remains a debt which is enforceable, or not, according to the question whether any plea of the statute is interposed or not.

Hence in many of the states the defense of the statute cannot be raised by demurrer, but must be pleaded specially. In Virginia, for instance, the statute must be the subject of a special plea, and cannot be raised by demurrer, for the reason that there certainly is a cause of action, and whether the debtor chooses to set up the bar, or not, is a matter of defense. As the provability of a debt depends not upon the question of the likelihood of recovery, but upon its existence, it would seem that in suits of this sort it could be proved, and would have to be taken notice

[66] In re Wright, Fed. Cas. No. 18,068; In re Eldridge, Fed. Cas. No. 4,331. *See "Bankruptcy," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 473.*

[67] In re John J. Lafferty & Bro. (D. C.) 122 Fed. 558; In re Putman (D. C.) 193 Fed. 464. *See "Bankruptcy," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 473.*

of, unless either the bankrupt, a creditor, or the trustee should plead the statute. Judge Ray, however, has held (on what impresses the author as sound reasoning) that although insertion of an outlawed debt in the schedule does not revive it as to creditors or prevent them from setting up the act of limitations, it does as to the bankrupt himself, so long as it does not affect the dividends of the other creditors.[68]

THE EXAMINATION OF THE BANKRUPT

54. The law requires the bankrupt to submit to an examination as to any matters which may affect the administration and settlement of his estate.

Section 7 of the bankrupt law requires the bankrupt to attend the first meeting of his creditors, if directed by a court or judge so to do, and, when present, submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate. It also provides that his testimony given in such an examination cannot be used against him in any criminal proceedings, and further that he cannot be required to attend beyond a given distance unless provision is made for the payment of his expenses. This examination is one of the most important matters that can come before the first meeting of the creditors. The fifty-eighth section entitles creditors to ten days' notice of all examinations of the bankrupt, though the general notice as to the first meeting is so worded as to give this requisite notice.

[68] In re Currier (D. C.) 192 Fed. 695. *See "Bankruptcy," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 473.*

The bankrupt is not only required to submit to an examination at the first meeting, but at other meetings, provided the necessary notices are given, and provision as to expenses, etc., carried out. As he alone can give the information almost essential to the proper management of the bankrupt estate, the ninth section of the act provides a method of holding him to bail, or under a modified form of custody upon satisfactory proof that he is about to leave the district to avoid examination, and that his departure will defeat the proceedings in bankruptcy. The examination may be had prior to the adjudication.[69]

In Re Lipke[70] it was held that this ninth section of the act was not exclusive in its provisions as to requiring the attendance of the bankrupt, but that, under subdivision 15 of the second section, which gives the courts a right to make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of a provision of this act, a writ in the nature of ne exeat may be issued to prevent the bankrupt from leaving the district, even in cases not covered by the ninth section.

When the bankrupt is present for examination, creditors whose claims are in the list, even though their debts are not proved, are entitled to examine.[71] When the examination is under way, it has been held that a voluntary bankrupt cannot refuse to give up papers or necessary documents on the ground that they might incriminate him or might be used against him in criminal proceedings; it being held that the filing of a voluntary petition is a waiver

[69] Cameron v. United States, 192 Fed. 548, 113 C. C. A. 20. *See "Bankruptcy," Dec. Dig. (Key-No.) § 236; Cent. Dig. §§ 393, 394.*

[70] (D. C.) 98 Fed. 970. See, also, In re Berkowitz (D. C.) 173 Fed. 1013. *See "Bankruptcy," Dec. Dig. (Key-No.) § 237.*

[71] In re Samuelsohn (D. C.) 174 Fed. 911; In re Barrager (D. C.) 191 Fed. 247. *See "Bankruptcy," Dec. Dig. (Key-No.) § 241.*

of the constitutional provision protecting a man from self-incrimination.[72]

It has also been held that a bankrupt cannot refuse to be sworn at the outset of the examination on the ground that it might incriminate him, but that he can claim the constitutional provision during the examination whenever a question is asked that might incriminate him. And in this same case it was held, that the provision in the seventh section to the effect that the bankrupt's testimony should not be offered against him in any criminal proceedings was not as extensive a protection as the constitutional provision against self-crimination; implying that, where his answers might give information that would lead to a better preparation of a criminal case against him, he was protected by the constitutional provision, and could not be required to answer.[73]

The examination of the bankrupt may go into transactions more than four months old, if pertinent in explaining transactions less than four months old.[74]

The twenty-first section of the act as originally passed permitted the examination not only of the bankrupt, but of any designated person, .concerning the acts, conduct, or property of the bankrupt whose estate is in process of administration, provided that designated person was a competent witness under the laws of the state in which the proceeding was pending. Under this provision the wife of the bankrupt could be examined if she was a competent

[72] In re Sapiro (D. C.) 92 Fed. 340. Compelling the bankrupt to surrender his books of account does not violate the constitutional provision, as this is not a question of testimony but of surrendering property which he no longer owns. In re Harris, 221 U. S. 274, 31 Sup. Ct. 557, 55 L. Ed. 732. *See "Bankruptcy," Dec. Dig. (Key-No.) § 238; Cent. Dig. § 406.*

[73] In re Scott (D. C.) 95 Fed. 815; In re Levin (D. C.) 131 Fed. 388; In re Feldstein (D. C.) 103 Fed. 269. *See "Bankruptcy," Dec. Dig. (Key-No.) § 241.*

[74] In re Brundage (D. C.) 100 Fed. 613. *See "Bankruptcy," Dec. Dig. (Key-No.) § 242; Cent. Dig. §§ 399–401.*

witness under the laws of the state; otherwise not. And her examination as to property in her possession, if reasonably pertinent, might also go back of four months.[75]

This twenty-first section of the act, however, has been amended by the act of February 5, 1903, so as to read as follows: "Sec. 21. (a) A court of bankruptcy, may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act: provided that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt."

Under this amendment the wife was made a competent witness irrespective of the provisions of the state law.

But the amendment of June 29, 1906, to section 858 of the Revised Statutes [76] seems to have restored the provisions of the state law as to all questions of competency. The original terms of section 858 applied the provisions of the state law as to the competency of witnesses "in the courts of the United States in trials at common law and in equity and admiralty."

The amendment adopts the state rules as to competency "in any civil action, suit or proceeding in the courts of the United States."

This language makes it difficult to escape the conclusion that Congress intended by it to include the bankruptcy courts.

[75] In re Foerst (D. C.) 93 Fed. 190; In re Mayer (D. C.) 97 Fed. 328. *See "Bankruptcy," Dec. Dig. (Key-No.) § 242; Cent. Dig. §§ 399–401.*

[76] Ante, p. 12.

CHAPTER VII

THE DISTRICT COURT (Continued)—BANKRUPTCY (Continued)

55. The Trustee.
56. The Title of the Trustee.
57. The Trustee's Duties of Administration—Recordation of Decree of Adjudication.
58. Same—The Collection of the Assets.
59. Same—Trustee's Rights against Parties Claiming Adversely under Alleged Void Transfers, etc.
60. Same—The Circumstances Avoiding an Alleged Illegal Transfer.
61. Same—Same—Insolvency.
62. The Trustee's Interest in Insurance Policies.
63. The Trustee's Interest in Rights of Action.
64. The Trustee's Power of Sale.
65. The Trustee's Duties as to Distribution of the Estate.
66. The Trustee's Duties as to the Bankrupt's Exemptions.

THE TRUSTEE

55. The election of a trustee is part of the business of the first creditors' meeting. The forty-fourth section of the act vests the right to select a trustee or trustees in the creditors, except that, if the creditors do not appoint a trustee or trustees, the court shall do so. And the seventeenth subdivision of the second section also gives the court the right to appoint trustees pursuant to the recommendation of creditors, or where they neglect to recommend the appointment of trustees.

In voting on the election of a trustee and other matters coming before the creditors' meeting, the fifty-sixth section of the act provides that a majority vote, in number and amount, of all creditors whose claims have been allowed and are present, shall be necessary to pass upon any matter before the meeting. Under this provision, all

creditors are counted whose claims have been allowed and who are present in person or by duly authorized attorney. If, for the purpose of voting, the attorney's proxy is defective, or he has no proxy at all, and on that ground cannot vote, the creditor is not present.[1]

A general representation of a creditor as attorney is not sufficient to give him a vote. The attorney must have an express written proxy.[2]

The election of a trustee is subject to approval by the referee or judge, but this power of approval does not confer the power to set aside the choice of the creditors and name a trustee not chosen by the creditors. The effect of the veto is to necessitate another election. It is only when the creditors fail to make any appointment that the referee or judge can act.[3]

The trustee is required by section 45 to be some individual competent to perform the duties, and a resident of the judicial district wherein he is appointed, or a corporation authorized by its charter to act as such; and he is required by the fiftieth section of the act to give bond for the faithful performance of his official duties.

THE TITLE OF THE TRUSTEE

56. The trustee's title vests as of the date of the adjudication, under the provisions of section 70 of the act. But although his title vests as of that date, it covers all property owned by the bankrupt at the date of filing the petition, including in this all property which has been illegally assigned.

[1] In re Henschel, 113 Fed. 443, 51 C. C. A. 277. *See "Bankruptcy," Dec. Dig. (Key-No.) § 123; Cent. Dig. §§ 171–179.*

[2] In re Lazoris (D. C.) 120 Fed. 716. *See "Bankruptcy," Dec. Dig. (Key-No.) § 123; Cent. Dig. §§ 171–179.*

[3] In re Hare (D. C.) 119 Fed. 246; In re Van De Mark (D. C.) 175 Fed. 287. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 126, 127; Cent. Dig. §§ 182, 183.*

The title of the trustee is the usual title of a statutory assignee. It is not the title, by any means, of an innocent holder of negotiable paper. He acquires the bankrupt's interest when that is such an interest as would be good against the bankrupt's creditors. For instance, under the mechanic lien laws of the different states, some of these liens relate back to the date of commencing the work; others, only to the date of giving the notice. If, therefore, work has been done which would be the subject of a lien from the inception of the work, the trustee would take the property subject to that lien. If, on the other hand, the lien dated only from the giving of the notice, and that notice had not been given at the commencement of proceedings, the trustee takes the property clear of the lien.[4]

On the other hand, any liens or charges that would be void as against the bankrupt and his creditors are voidable by the trustee; and, conversely, any which are good as against the creditors of the bankrupt are good against the trustee.[5] It may be, however, that, even where it eventually turns out that the transaction is valid, yet, for the purpose of administering the bankrupt estate, the court would have jurisdiction of any property in the possession of the bankrupt, or to which the trustee might claim a color of title. In other words, under the seventh subdivision of section 2, the estate to be administered by the court may be more extensive than the property which would on full investigation finally pass to the trustee.[6]

[4] In re Coulter, Fed. Cas. No. 3,276; In re Roeber, 121 Fed. 449, 57 C. C. A. 565; In re Laird, 109 Fed. 550, 48 C. C. A. 538; In re Grissler, 136 Fed. 754, 69 C. C. A. 406. *See "Bankruptcy," Dec. Dig. (Key-No.) § 192; Cent. Dig. § 294.*

[5] NORTON v. HOOD, 124 U. S. 20, 8 Sup. Ct. 357, 31 L. Ed. 364; In re New York Economical Printing Co., 110 Fed. 514, 49 C. C. A. 133; In re Williamsburg Knitting Mill (D. C.) 190 Fed. 871; Bryant v. Swofford, 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997; Holt v. Crucible Steel Co., 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 140, 184.*

[6] In re Union Trust Co., 122 Fed. 937, 59 C. C. A. 461. *See "Bankruptcy," Dec. Dig. (Key-No.) § 140; Cent. Dig. §§ 193, 198.*

The mere fact, however, that certain property is in the personal custody of the bankrupt, does not necessarily subject it to the control of the trustee. For instance, property that the bankrupt might hold in trust, and that is so earmarked as to be capable of identification, would not pass to the assignee.[7]

While the title of the trustee dates from the adjudication, the property which vests in him dates as of the day of filing the petition.[8]

Character of Property Which Vests in Trustee

The character of the property which vests in him is defined in the seventieth section of the act. The two most general classes named in that section are the fourth and fifth, which are property transferred by the bankrupt in fraud of his creditors, and property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him. This last section has been held to have a very extensive meaning. A seat in a stock exchange which could be transferred vests in the trustee, though the transfer is so uncertain that it requires the consent of certain authorities of the exchange.[9]

Under the act of 1867 (14 Stat. 517, c. 176) it was held that a claim to share in the sum paid to the United States under the Geneva award on account of the Alabama cap-

[7] Hosmer v. Jewett, Fed. Cas. No. 6,713. Sometimes trust funds or property may be traced. It turns on the facts of each case. In re Royea's Estate (D. C.) 143 Fed. 182; Block v. Rice (D. C.) 167 Fed. 693; In re Lindsley & Co. (D. C.) 185 Fed. 684; In re Ennis, 187 Fed. 728, 109 C. C. A. 476. *See "Bankruptcy," Dec. Dig. (Key-No.) § 140; Cent. Dig. §§ 198–225.*

[8] In re Garcewich, 115 Fed. 87, 53 C. C. A. 510; NORTON v. HOOD, 124 U. S. 20, 8 Sup. Ct. 357, 31 L. Ed. 364; Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. ——. *See "Bankruptcy," Dec. Dig. (Key-No.) § 152; Cent. Dig. § 194.*

[9] PAGE v. EDMUNDS, 187 U. S. 596, 23 Sup. Ct. 200, 47 L. Ed. 318. *See "Bankruptcy," Dec. Dig. (Key-No.) § 143; Cent. Dig. §§ 194–224.*

tures vested in the assignee, who was the officer corresponding to the trustee under the present act.[10]

Under this clause the property transferred by the bankrupt in fraud of his creditors includes any property which could be recovered by the trustee on any of the other grounds specified in the act.

For instance, it includes property recoverable under the clause defining illegal transfers. This is covered by the sixtieth section of the act. In its original form, it provided that a person should be deemed to have given a preference, if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. And paragraph "b," § 60, of the same act provided that if the bankrupt shall have given a preference within four months before the filing of the petition, or after the filing of the petition and before the adjudication, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.

These two paragraphs have been materially changed by the amendments of February 5, 1903 (32 Stat. 799, c. 487, § 13), and June 25, 1910 (36 Stat. 842, c. 412, § 11), so that they now read as follows (U. S. Comp. St. 1911, p. 1506):

"Sec. 60 (a). A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any per-

[10] Williams v. Heard, 140 U. S. 529, 11 Sup. Ct. 885, 35 L. Ed. 550. *See "Bankruptcy," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 193–204.*

son, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

"(b). If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months from the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Where the preference is in the creation of liens, it is covered by the sixty-seventh section of the act. This section has not been changed by the act of February 5, 1903, except that to paragraph "e" has been added a sentence conferring upon the bankruptcy court concurrent jurisdiction with the state court which would have had jurisdiction if bankruptcy had not intervened in recovering property illegally transferred. The amendment of June 25,

1910, makes a slight change in subdivision "d," which is unimportant in this connection.

In order to constitute an illegal preference, actual value must pass. Book entries intended to have that purpose, but which are frustrated and create no harm, are not of themselves preferences.[11] Nor is it a preference to pay claims on account of a dower interest which is a valid charge upon the property.[12]

An assignment for creditors is also a preference, and even where the state law provides that, in the administration of assignments, all claims for wages shall be preferred that preference falls with it. The priorities claimed by the bankrupt law are exclusive in such case, and, where a priority is given by a state law, not in the nature of a lien on the property, but simply in the nature of a direction to an assignee in a general assignment to pay the same prior to other claims, such claims cannot be so treated if their priority arises by virtue of making a deed of assignment which is itself voidable.[13]

It is not, however, a preference where a debt is paid in full, and then a new bill sold. In such case the new bill constitutes a new transaction, and the creditor does not have to surrender his prior payment.[14]

Under paragraph "d" of the sixty-seventh section, as amended June 25, 1910, liens created for a present consideration, and properly recorded where record is necessary, and free from fraud, are upheld to the extent of such present consideration only, although the bankrupt at the time of the creation of the lien is insolvent. And where a mort-

[11] In re Steam Vehicle Co. of America (D. C.) 121 Fed. 939. *See "Bankruptcy," Dec. Dig. (Key-No.) § 165.*

[12] In re Riddle's Sons (D. C.) 122 Fed. 559. *See "Bankruptcy," Dec. Dig. (Key-No.) § 165.*

[13] In re Erie Lumber Co. (D. C.) 150 Fed. 817, 824. *See "Bankruptcy," Dec. Dig. (Key-No.) § 184.*

[14] In re Wolf & Levy (D. C.) 122 Fed. 127; JAQUITH v. ALDEN, 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717. *See "Bankruptcy," Dec. Dig. (Key-No.) § 165.*

gage covers such a debt, and also an old debt which is against the act, it will be upheld to the extent of the valid debt.[15]

Under the provision setting aside conveyances intended to hinder, delay, and defraud, such a conveyance may be attacked as violating the ordinary state statutes based upon the statute of 13 Elizabeth, though it could not be attacked under the illegal preference provision of the bankrupt act.[16]

Paragraph "f" of the sixty-seventh section avoids all liens acquired in invitum within four months prior to the filing of the petition in bankruptcy. Under this section, if the lien was in existence more than four months prior, the mere fact that it was consummated by a judgment or attempted to be enforced by execution after the four months did not avoid it. If, on the other hand, an execution had been levied and the property sold under it, the purchaser, if innocent of fraud, acquired a good title; and the money, if the lien was void, would go to the trustee, or, if valid, would go to the execution creditor. So the question of the lien on an execution is not so important as the question of the lien of the judgment. If the judgment is more than four months old, it is valid, though the execution is issued within the four months. If the judgment is less than four months old, it is invalid, and the execution upon it is also invalid.[17]

[15] In re Soudan Mfg. Co., 113 Fed. 804, 51 C. C. A. 476; Davis v. Turner, 120 Fed. 605, 56 C. C. A. 669; In re Dismal Swamp Contracting Co. (D. C.) 135 Fed. 415; In re Jackson Brick & Tile Co. (D. C.) 189 Fed. 636, 645. *See "Bankruptcy," Dec. Dig. (Key-No.) § 165; Cent. Dig. §§ 259–266.*

[16] Means v. Dowd, 128 U. S. 273, 9 Sup. Ct. 65, 32 L. Ed. 429. *See "Bankruptcy," Dec. Dig. (Key-No.) § 175; Cent. Dig. §§ 247, 248.*

[17] In re Kenney (D. C.) 95 Fed. 427; Clarke v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555; In re Martin, 193 Fed. 841, 113 C. C. A. 627; In re Ransford, 194 Fed. 658, 115 C. C. A. 560; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956. *See "Bankruptcy," Dec. Dig. (Key-No.) § 196; Cent. Dig. §§ 306–316.*

Although the lien is simply a lien acquired by the filing of a creditors' bill, and subject to the contingencies of such a suit, it is valid, if finally upheld on the merits, provided it has been acquired more than four months before the filing of the proceedings in bankruptcy.[18]

THE TRUSTEE'S DUTIES OF ADMINISTRATION —RECORDATION OF DECREE OF ADJUDICATION

57. The trustee is required, within thirty days after the adjudication, to file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution.

The forty-seventh section of the act sets out the trustee's duties in connection with the management of the estate. An important addition to the original section has been made by the act of February 5, 1903. It provides that the trustee shall within thirty days after the adjudication file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing. The value of this as a link in the chain of title of the bankrupt's estate is great. The act of June 25, 1910, amended subdivision "a" (2) of this same section by giving trustees as to property under the custody of the bankrupt court the same remedies as those possessed by lien or judgment creditors.

[18] METCALF BROS. v. BARKER, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; In re Crafts-Riordon Shoe Co. (D. C.) 185 Fed. 931. *See "Bankruptcy," Dec. Dig. (Key-No.) § 195; Cent. Dig. §§ 287–289.*

SAME—THE COLLECTION OF THE ASSETS

58. It is the trustee's duty to collect the assets of the bankrupt estate.

If the bankrupt does not turn over the proper books or other papers, the trustee may institute contempt proceedings to compel him to do so.[19] As to any property in the hands of parties not asserting adverse claim thereto, he may proceed summarily in the bankruptcy court itself.[20] Nor is a party an adverse claimant merely because he refuses to surrender property. If he sets up an adverse claim, and the pleading which sets it up shows on its face no title, then the bankruptcy court has jurisdiction to deside whether he is an adverse claimant, or not, and to proceed accordingly. For instance, if the party asserts a lien by attachment, which, upon his own claim, is avoidable under the provisions of the bankrupt law, he is not an adverse claimant. In order to make him such, he must claim a right to hold the property under a bona fide colorable claim of title. For instance, a surety on a bail bond of the bankrupt, with whom the bankrupt had deposited money to protect his interests, and who held it for that purpose, is an adverse claimant.[21] So, too, a party claiming property alleged to be fraudulently conveyed, where the question whether the conveyance was fraudulent or not was a matter of fact, and could not necessarily be settled by an inspection of the pleadings themselves, is an ad-

[19] In re Wilson (D. C.) 116 Fed. 419. *See "Bankruptcy," Dec. Dig. (Key-No.) § 136; Cent. Dig. §§ 233, 235.*

[20] Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405: Staunton v. Wooden, 179 Fed. 61, 102 C. C. A. 355. *See "Bankruptcy," Dec. Dig. (Key-No.) § 288.*

[21] Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620. *See "Bankruptcy," Dec. Dig. (Key-No.) § 293.*

verse claimant.[22] Under this principle, an assignee in a deed of general assignment is not an adverse claimant, and can be proceeded against summarily, for that is an act of bankruptcy of itself, and is a matter of law, which the assignee must know, and therefore for which he cannot assert a colorable adverse claim.[23]

SAME—TRUSTEE'S RIGHTS AGAINST PARTIES CLAIMING ADVERSELY UNDER ALLEGED VOID TRANSFERS, ETC.

59. The right to avoid transfers or illegal preferences under the bankruptcy act is vested in the trustee alone. Creditors of the bankrupt cannot proceed in their own names, though they allege that they have applied to the trustee and that he has refused to proceed; for the bankrupt act makes him the sole judge of the propriety of such procedure.[24]

The usual remedy resorted to for the purpose of avoiding transfers forbidden by the act is a bill in equity in the name of the trustee.[25]

[22] In re Hartman (D. C.) 121 Fed. 940. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 212, 293.*

[23] BRYAN v. BERNHEIMER, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; In re Thompson (D. C.) 122 Fed. 174; Id., 128 Fed. 575, 63 C. C. A. 217. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 116, 212, 293.*

[24] GLENNY v. LANGDON, 98 U. S. 20, 25 L. Ed. 43; Bankr. Act July 1, 1898, c. 541, § 70e, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3452); In re Hurst (D. C.) 188 Fed. 707, 709. *See "Bankruptcy," Dec. Dig. (Key-No.) § 209; Cent. Dig. § 318.*

[25] Cox v. Wall (D. C.) 99 Fed. 546; Wall v. Cox, 101 Fed. 403, 41 C. C. A. 408; Id., 181 U. S. 244, 21 Sup. Ct. 642, 45 L. Ed. 845 (although the decision of the lower court was reversed in the Supreme Court on the question of jurisdiction of the federal courts, it was not reversed on the question of the remedy); Allen v. Massey, 17 Wall. 351, 21 L. Ed. 542; Harmanson v. Bain, Fed. Cas. No. 6,072; Johnson v. Hanley, Hove Co. (D. C.) 188 Fed. 752. *See "Bankruptcy," Dec. Dig. (Key-No.) § 209; Cent. Dig. § 318.*

Under section 23 of the original act, it is settled by repeated decisions in the United States Supreme Court that the federal courts did not have jurisdiction over such suits, unless they would have had jurisdiction of the controversy in case bankruptcy proceedings had not been instituted, and the controversy had been between the bankrupt and adverse claimants.[26]

The effect of these decisions was to take from the federal courts all but their mere administrative jurisdiction, and to relegate to the state courts the most important class of controversies which arise under the bankrupt act. The amendment of February 5, 1903, was intended to restore this jurisdiction to the federal courts. It amended section 23b to read as follows, the added portion being in italics: "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under section 60, subdivision 'b,' and section 67, subdivision 'e.'*" The act of June 25, 1910, further amended this by adding at the end the words "and section 70, subdivision 'e.'"

It also added to section 60, par. "b" (the section avoiding illegal preferences), to section 67e (the section avoiding conveyances made to hinder, delay, and defraud), and to section 70e (the section authorizing the trustee to avoid illegal transfers) the following words: "For the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

[26] Bardes v. First Nat. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 210, 211; Cent. Dig. §§ 321–323.*

Under section 1, subd. 8, courts of bankruptcy are defined as including the district courts of the United States, and the territories, the supreme court of the District of Columbia, and the United States courts of the Indian Territory and of Alaska. Hence, under this amendment, these federal courts would have concurrent jurisdiction with the state courts over such controversies. But in a case arising prior to the amendment of June 25, 1910, it was held that a suit by a trustee to set aside a fraudulent transfer of a bankrupt's property more than four months before the filing of the petition could not be sustained in the federal court unless the defendant consented; because such a suit would not fall under either section 60b or section 67e, but only under section 70e, which was not then excepted.[27] The addition made by the act of June 25, 1910, though made before this decision, seems to remedy this difficulty.

These amendments however apply only to the cases therein named, that is, illegal preferences under section 60b, conveyances to hinder, delay and defraud under section 67e, and illegal transfers under section 70e. They do not apply to ordinary controversies not included in either of these classes.[28]

In a suit by the trustee to set aside an alleged illegal transfer, the bankrupt is not a necessary party, as he no longer has any interest in the result.[29]

[27] Wood v. A. Wilbert's Sons Shingle & Lumber Co., 226 U. S. 384, 33 Sup. Ct. 125, 57 L. Ed. ——. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 210, 292, 293.*

[28] Harris v. First Nat. Bank of Mt. Pleasant, Texas, 216 U. S. 382, 30 Sup. Ct. 296, 54 L. Ed. 528. *See "Bankruptcy," Dec. Dig. (Key-No.) § 293.*

[29] Buffington v. Harvey, 95 U. S. 99, 24 L. Ed. 381. *See "Bankruptcy," Dec. Dig. (Key-No.) § 299; Cent. Dig § 448.*

SAME—THE CIRCUMSTANCES AVOIDING AN ALLEGED ILLEGAL TRANSFER

60. The circumstances which will avoid an alleged illegal transfer are

(1) that the bankrupt must be insolvent, and

(2) that the party benefited must have had reasonable cause to believe that the bankrupt was insolvent, and that he intended to violate the provisions of the act.

Under sections 60 and 67, a suit to avoid an illegal preference is not sustainable unless the bankrupt is insolvent, and unless the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, or, in the case of liens, that the party had reasonable cause to believe that the defendant was insolvent and in contemplation of bankruptcy, or that the lien was sought and permitted in fraud of the provisions of the act. This applies simply to these two methods of creating an illegal preference. As to suits to set aside a conveyance with intent to hinder, delay, or defraud creditors, based on statutes similar to the statute of 13 Elizabeth, they are void, except as to purchasers in good faith, and for present, fair consideration.

In reference to preferences, therefore, two requisites must concur before the trustee can recover: First, the bankrupt must be insolvent; and, second, the transferee must have had reasonable cause to believe he intended to give a preference, which involves reasonable cause to believe that he was insolvent; or, as to liens, that he was insolvent and in contemplation of bankruptcy, or that such lien was sought and permitted in fraud of the provisions of the act. Substantially, therefore, the bankrupt must, in the first place, be insolvent; and, in the second place,

the party benefited must have reasonable cause to believe that he was insolvent, and that he intended to violate the provisions of the act.[30]

SAME—SAME—INSOLVENCY

61. A party is deemed insolvent, under the provisions of the first section of the act whenever the aggregate of his property exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed, or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.

This marks a radical distinction between the present act and the act of 1867. Under the latter act a party was insolvent when he was unable to meet his debts as they accrued. Under the present act, if his property is sufficient to pay his debts, he is solvent, though he may go to protest and fail to provide for their payment. This is true even as to the bankrupt himself, in passing upon the question whether he has committed those acts of bankruptcy which involve insolvency as an essential element.[31]

This meaning of insolvency is so different from its usual meaning in the law that even the appointment of a receiver on the ground of insolvency under a state statute, where the word has its old meaning, does not prove insolvency under the bankrupt act with its present meaning. If a fair estimate shows an excess of assets over liabilities, the bankrupt is not insolvent.[32]

[30] Tumlin v. Bryan, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960; In re The Leader (D. C.) 190 Fed. 624. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 160, 166; Cent. Dig. §§ 249–258.*

[31] In re Rogers' Milling Co. (D. C.) 102 Fed. 687. *See "Bankruptcy," Dec. Dig. (Key-No.) § 160; Cent. Dig. § 249.*

[32] In re Doscher (D. C.) 120 Fed. 408. This is changed by the amendment of February 5, 1903, which makes the appointment of a

Nor does any presumption of the existence of insolvency arise from the making of an adjudication in bankruptcy, nor from the want of ready money to pay debts.[33]

In determining the value of property, it is estimated on the theory of a fair appraisement, and not necessarily on the price that a purchaser would give who tried to take advantage of the bankrupt's situation.[34]

A partnership is solvent if the individual and firm assets together exceed the liabilities.[35]

But though the bankrupt is insolvent, the transaction will still hold, unless the party benefited had reasonable cause to believe that he was insolvent, and that he intended to violate the act. Here, too, the decisions under the former act must be used with caution. Where insolvency consists in an inability to meet obligations as they mature, many circumstances of suspicion might be brought home to the party benefited that would be entitled to little weight under the meaning of the word in the present statute. Even under the former act mere suspicion that the bankrupt was in trouble, or knowledge that he was slow in paying his debts, was not sufficient to bring such knowledge home to the party benefited. Under the present act a stronger train of circumstances would be necessary, for,

receiver on the ground of insolvency an act of bankruptcy. In proceedings of this character the word may have a much wider meaning than under the bankrupt act. Cincinnati Equipment Co. v. Degnan, 184 Fed. 834, 107 C. C. A. 158. *See "Bankruptcy," Dec. Dig. (Key-No.) § 160; Cent. Dig. § 249.*

[33] In re Chappell (D. C.) 113 Fed. 545. But where the fact of insolvency is one of the issues necessarily involved in making the adjudication, its existence is conclusively established by the adjudication and cannot be collaterally questioned. Cook v. Robinson, 194 Fed. 785, 114 C. C. A. 505. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 100, 160.*

[34] In re Hines (D. C.) 144 Fed. 142; Rutland County Nat. Bank v. Graves (D. C.) 156 Fed. 168. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 54, 160; Cent. Dig. §§ 54, 84, 85, 249.*

[35] Francis v. McNeal, 186 Fed. 481, 108 C. C. A. 549. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 54, 160; Cent. Dig. §§ 54, 84, 85, 249.*

as has been seen above, a party embarrassed might go to protest, and still be solvent. An interesting discussion of the meaning of insolvency under the present act, as compared with the old act, is contained in Re Eggert,[36] though that decision apparently gives more weight to the cases under the old act than they ought to have, and does not sufficiently emphasize the difference between the two acts. So, too, the knowledge by the party benefited of the existence of certain indebtedness on the part of the bankrupt is not of itself sufficient, for it must be remembered that the interests of the commercial world demand freedom of alienation just as much as they demand the enforcement of the provisions of the bankrupt act.[37]

THE TRUSTEE'S INTEREST IN INSURANCE POLICIES

62. The trustee is entitled to any insurance policy payable to the bankrupt which has a cash surrender or an actual value, unless the bankrupt chooses to redeem such policy.

Under section 70 the trustee is entitled to any insurance policy in the name of the bankrupt which has a cash surrender value and is payable to the bankrupt, unless the bankrupt chooses to redeem the policy. But this only applies to policies that have a cash surrender value, though the decisions on the point were for a long time in conflict.[38]

[36] (D. C.) 98 Fed. 843, Id., 102 Fed. 735, 43 C. C. A. 1. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 54, 160, 166.*

[37] As to the test of "reasonable cause to believe," see First Nat. Bank of Philadelphia v. Abbott, 165 Fed. 852, 91 C. C. A. 538; Stern v. Paper (D. C.) 183 Fed. 228. *See "Bankruptcy," Dec. Dig. (Key-No.) § 166; Cent. Dig. §§ 250–258.*

[38] Hiscock v. Mertens, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771; Burlingham v. Crouse, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. ——. This section of the act does not apply in states which make an insurance policy exempt from claims of creditors. In such case the

THE TRUSTEE'S INTEREST IN RIGHTS OF ACTION

63. The trustee is entitled to all rights of action arising upon contracts, or from the unlawful taking or detention of, or injury to, the bankrupt's property.

The seventieth section of the act provides that the trustee shall be entitled to all rights of action arising upon contracts, or from the unlawful taking or detention of, or injury to, the bankrupt's property. Under this provision the trustee does not become entitled to the bankrupt's right of action for torts to the person—for instance, to rights of action for slander or malicious prosecution.[39]

THE TRUSTEE'S POWER OF SALE

64. The trustee has the power to hold a sale after due notice to all parties in interest, which, however, is subject to confirmation by the court. The sale may be a public or private one, according to circumstances.

This power is necessarily implied in the right given by the forty-seventh section of the act to collect and reduce to money the property of the estates for which they are trus-

bankrupt can retain them without being required to pay the cash surrender value to the trustee. Holden v. Stratton, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018; In re Johnson (D. C.) 176 Fed. 591. *See "Bankruptcy," Dec. Dig. (Key-No.) § 396; Cent. Dig. §§ 659–668.*

[39] Dillard v. Collins, 25 Grat. (Va.) 343; In re Haensell (D. C.) 91 Fed. 355. An action of deceit based on false representations as to goods is an injury to property and passes to the trustee. In re Gay (D. C.) 182 Fed. 260. So an action to recover usurious interest. First Nat. Bank v. Lasater, 196 U. S. 115, 25 Sup. Ct. 206, 49 L. Ed. 408. *See "Bankruptcy," Dec. Dig. (Key-No.) § 145; Cent. Dig. §§ 205, 230–234.*

tees, under the direction of the court. Under the fifty-eighth section, creditors are entitled to notice of all proposed sales of property; and, after the property is sold, the court has a general supervision over the question whether to confirm the sale or not, and exercises it under the ordinary principles governing judicial sales, but will not set aside a sale merely because a somewhat better price could be obtained, though it will set it aside if improperly conducted, though the purchaser was not himself guilty of any impropriety.[40]

The eighteenth bankruptcy order [41] requires sales to be at public auction, unless otherwise ordered, but permits private sales under certain circumstances.

There is no express provision in the present act authorizing the sale of property free of incumbrances. This was a common practice under the former act, and the courts deduce the right to order such sales under the present act from the necessity for prompt action, and the general powers conferred upon them by the act. A sale may be ordered free from incumbrances even when it is not certain that there is no equity of redemption.[42]

But there must be some probability that it is to the interest of the general creditors, before such a sale will be ordered.[43]

Such a sale, however, cannot be ordered without giving

[40] In re Ethier (D. C.) 118 Fed. 107; In re Belden (D. C.) 120 Fed. 524; In re Shea (D. C.) 122 Fed. 742. *See "Bankruptcy," Dec. Dig. (Key-No.) § 269; Cent. Dig. § 370.*

[41] 172 U. S. 659, 18 Sup. Ct. vi, 43 L. Ed. 1191; post, p. 460. *See "Bankruptcy," Dec. Dig. (Key-No.) § 262; Cent. Dig. §§ 363–365.*

[42] In re Union Trust Co., 122 Fed. 937, 59 C. C. A. 461; In re Torchia (D. C.) 185 Fed. 576. *See "Bankruptcy," Dec. Dig. (Key-No.) § 258; Cent. Dig. §§ 358–362.*

[43] In re Pittelkow (D. C.) 92 Fed. 901; Southern Loan & Trust Co. v. Benbow (D. C.) 96 Fed. 514; In re Shaeffer (D. C.) 105 Fed. 352; In re Roger Brown & Co., 196 Fed. 758, 116 C. C. A. 386; In re Fayetteville Wagon-Wood & Lumber Co. (D. C.) 197 Fed. 580. *See "Bankruptcy," Dec. Dig. (Key-No.) § 257.*

notice to all parties in interest, and giving them a day in court.[44] A sale may be ordered by the referee.[45]

THE TRUSTEE'S DUTIES AS TO DISTRIBUTION OF THE ESTATE

65. It is the trustee's duty to distribute the estate in accordance with, and observance of, certain priorities prescribed by law.

In the distribution, certain priorities are prescribed by the sixty-fourth section of the act. The trustee must, of course, observe them. He must pay all taxes due to the United States or state, or any municipal subdivision thereof, before he can pay any dividend, including taxes after his qualification.[46]

Debts Due the United States

It was long a question, under the present act, whether debts due to the United States which are not taxes are a prior claim. Under the act of 1867 there was an express provision giving them priority.[47] The fact that this provision is omitted in the present act, and only taxes due the United States mentioned as prior, might be taken as

[44] Factors' & Traders' Ins. Co. v. Murphy, 111 U. S. 738, 4 Sup. Ct. 679, 28 L. Ed. 582; In re Pittelkow (D. C.) 92 Fed. 901; In re Kohl-Hepp Brick Co., 176 Fed. 340, 100 C. C. A. 260. But if he knows of the sale and does not object, he cannot set up want of formal notice. In re Caldwell (D. C.) 178 Fed. 377. *See "Bankruptcy," Dec. Dig. (Key-No.) § 261; Cent. Dig. §§ 361, 362.*

[45] In re Sanborn (D. C.) 96 Fed. 551; In re Waterloo Organ Co. (D. C.) 118 Fed. 904; In re Miners' Brewing Co. (D. C.) 162 Fed. 327. *See "Bankruptcy," Dec. Dig. (Key-No.) § 262.*

[46] Swarts v. Hammer, 194 U. S. 441, 24 Sup. Ct. 695, 48 L. Ed. 1060. And he must not wait for the tax officials to present the bills. In re Weissman (D. C.) 178 Fed. 115. Water rents under municipal ordinances are taxes. In re Industrial Cold Storage & Ice Co. (D. C.) 163 Fed. 390. *See "Bankruptcy," Dec. Dig. (Key-No.) § 346; Cent. Dig. § 535.*

[47] Lewis v. U. S., 92 U. S. 618, 23 L. Ed. 513. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 345, 349; Cent. Dig. § 533.*

some evidence of an intent on the part of Congress to abolish that priority; but, on the other hand, the bankrupt law contains no section to the effect that its provisions are intended to be exclusive, and contains no clause of repeal of any other acts. Hence section 3466 of the Revised Statutes,[48] which gives priority to the United States in the event of winding up an insolvent estate, is not affected by the bankrupt act. The ordinary principles of construction, which lean against excluding the sovereign from the benefits of statutes, would be applicable, and tend to strengthen the claim of the government to priority. Hence, even if the government did not prove its claim at all, no laches could be imputed to it, and it would be the duty of the trustee, if he knew of the claim, to pay it. This priority of the government, however, is not in the nature of a lien, and, if the trustee distributed the estate without knowledge of a governmental claim against the bankrupt, he could not be held accountable for doing so.[49]

Under the first paragraph of the sixty-fourth section, the trustee must pay taxes even upon the property of the bankrupt exempt as a homestead.[50]

And there is no obligation upon the governmental organization to whom the taxes are due to prove its claim for taxes, but it is the duty of the trustee to pay them without such proof.[51]

[48] U. S. Comp. St. 1901, p. 2314.

[49] Since the above was written the question of priority as between an ordinary debt due the United States and labor claims arose in Title Guaranty & Surety Co. v. Guarantee Title & Trust Co., 174 Fed. 385, 98 C. C. A. 603. It was decided in favor of the priority of the United States. On appeal the decision was reversed. Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706. But the opinion simply passes on the question of priority as to labor claims, and settles nothing as to others. *See "Bankruptcy," Dec. Dig. (Key-No.) § 349; Cent. Dig. § 533.*

[50] In re Tilden (D. C.) 91 Fed. 500. *See "Bankruptcy," Dec. Dig. (Key-No.) § 346; Cent. Dig. § 535.*

[51] In re Prince & Walter (D. C.) 131 Fed. 546. *See "Bankruptcy," Dec. Dig. (Key-No.) § 327.*

Priority of Wages

Another priority given by the sixty-fourth section is wages due to workmen, clerks, or servants, which have been earned within three months before the date of the commencement of the proceedings, not to exceed $300 to each claimant. This provision is intended to cover the subject of priority of wages. The clerk or workman cannot claim priority for three months under this provision, and then for a greater time where the state law gives him a greater protection, even under the fifth subdivision, giving priority to debts owing to any person who by the laws of the states or the United States is entitled to priority. This last subdivision is not intended to extend the preceding subdivision relating to wages.[52]

This preference to wages does not displace existing liens.[53]

This provision is intended to cover wages which have accrued in three months, whether they are actually due and payable or not.[54]

THE TRUSTEE'S DUTIES AS TO THE BANKRUPT'S EXEMPTIONS

66. It is the trustee's duty to set apart all exemptions in favor of the bankrupt allowed by the state or federal law. It is then within the province of the bankrupt court to allow or disallow said exemptions.

[52] In re Shaw (D. C.) 109 Fed. 782; In re Slomka, 122 Fed. 630, 58 C. C. A. 322; In re McDavid Lumber Co. (D. C.) 190 Fed. 97; In re H. O. Roberts Co. (D. C.) 193 Fed. 294. *See "Bankruptcy," Dec. Dig. (Key-No.) § 348; Cent. Dig. § 536.*

[53] In re Proudfoot (C. C.) 173 Fed. 733; In re Yoke Vitrified Brick Co. (D. C.) 180 Fed. 235. *See "Bankruptcy," Dec. Dig. (Key-No.) § 348; Cent. Dig. § 536.*

[54] In re B. H. Gladding Co. (D. C.) 120 Fed. 709. *See "Bankruptcy," Dec. Dig. (Key-No.) § 348; Cent. Dig. § 536.*

The bankrupt is entitled, under the sixth section, to the exemptions allowed by the state laws; and, under the forty-seventh section, it is the trustee's duty to set the exemption apart and report his action to the court. And under the eleventh subdivision of the second section, the court has power to determine all claims of bankrupts to their exemptions. Under this provision the court has power to consider the bankrupt's claim to exemption up to the point when it is finally set aside to him. Prior to that it has the right to say whether the bankrupt is entitled to certain property as exempt, or not. For instance, where the state law provided that the bankrupt should not claim property as exempt against the purchase price, and the bankrupt set up a claim to such property, and the creditors came into the bankrupt court to resist the claim, the court has the power to pass upon it.[55] In fact, the bankrupt court has exclusive jurisdiction to determine the claim of the bankrupt to an exemption.[56] But when the exemption is once set aside to the bankrupt, it is no longer a part of the estate under the jurisdiction of the court, and then the court has no jurisdiction in controversies concerning it.[57] It cannot consider disputes in relation to it between the bankrupt and creditors who claim to hold obligations waiving it.[58]

[55] In re Boyd (D. C.) 120 Fed. 999. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 293, 396.*

[56] McGahan v. Anderson, 113 Fed. 115, 51 C. C. A. 92; In re McCrary (D. C.) 169 Fed. 485. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 293, 396.*

[57] In re Black (D. C.) 104 Fed. 289; In re McKissac (D. C.) 171 Fed. 259. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 293, 396.*

[58] LOCKWOOD v. EXCHANGE BANK, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 396, 399.*

CHAPTER VIII

DISTRICT COURT (Continued)—BANKRUPTCY (Continued)

67. The Discharge—Application for.
68. Same—Method of Opposing.
69. Same—Burden of Proof.
70. Grounds of Opposition to Discharge.
71. The Debts Not Affected by a Discharge.
72. Revocation of a Discharge.

THE DISCHARGE—APPLICATION FOR

67. The discharge is the release of the bankrupt from all of his indebtedness which the bankruptcy can affect. Application therefor may be made within certain limits as to time; and, upon notice to all parties in interest; and after a hearing granted the applicant and those who oppose the discharge, the same is granted or refused by the court.

The procedure relating to a discharge is regulated by section 14 of the act, as amended by the acts of February 5, 1903, and June 25, 1910 (U. S. Comp. St. Supp. 1911, p. 1496). The application cannot be made until one month after the adjudication, and must be made within twelve months after it, though the judge may, under certain circumstances, allow six additional months.[1]

Under section 58 of the original act the creditors are entitled to ten days' notice, by mail, of any hearing upon the application for the discharge. This notice must be by mail, and cannot be by publication—certainly not unless it is

[1] In re Chase (D. C.) 186 Fed. 408; In re Bacon, 193 Fed. 34, 113 C. C. A. 358. *See "Bankruptcy," Dec. Dig. (Key-No.) § 410; Cent. Dig. § 694.*

shown that the address of the creditor cannot be obtained.[2] The amendment of June 25, 1910, has enlarged the notice required in case of discharge to thirty days.

Corporations as well as individuals may ask for a discharge.[3]

Where a partnership has filed a petition in bankruptcy, the individual partners may apply separately for a discharge, and need not join in such application.[4]

A bankrupt who applied for a discharge under the act of 1867 and was refused is not thereby precluded from applying under the act of 1898. The two acts are entirely dissimilar, and adjudications under the first would not be res judicata under the second. And this second application may be for a discharge from debts existing under the old act as well.[5]

The better opinion is that a bankrupt can apply for a discharge but once. He is then given his day in court and opportunity to show his right to a discharge, and he cannot expect to relitigate the question.[6]

The parties entitled to oppose a discharge in addition to the trustee are, in the language of the act, "parties in interest." This includes a creditor whose name is in the bankrupt's list of creditors, although he has not proved his debt.[7]

[2] In re Dvorak (D. C.) 107 Fed. 76. *See "Bankruptcy," Dec. Dig. (Key-No.) § 412; Cent. Dig. §§ 696, 697.*

[3] In re Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38. *See "Bankruptcy," Dec. Dig. (Key-No.) § 404.*

[4] In re Meyers (D. C.) 97 Fed. 757. *See "Bankruptcy," Dec. Dig. (Key-No.) § 404.*

[5] In re Herrman (D. C.) 102 Fed. 753; Id., 106 Fed. 987, 46 C. C. A. 77. *See "Bankruptcy," Dec. Dig. (Key-No.) § 404.*

[6] In re Fiegenbaum, 121 Fed. 69, 57 C. C. A. 409; In re Silverman, 157 Fed. 675, 85 C. C. A. 224; In re Pullian (D. C.) 171 Fed. 595. Contra, In re Claff (D. C.) 111 Fed. 506. *See "Bankruptcy," Dec. Dig. (Key-No.) § 404.*

[7] In re Conroy (D. C.) 134 Fed. 764; In re Harr (D. C.) 143 Fed. 421. *See "Bankruptcy," Dec. Dig. (Key-No.) § 405; Cent. Dig. §§ 709–711.*

A creditor who has appeared in a bankruptcy proceeding cannot oppose the discharge on the ground that the petition for bankruptcy was not filed in the right district. By appearing he waives any objections which merely affect the question of the personal jurisdiction of the court over the bankrupt.[8]

SAME—METHOD OF OPPOSING

68. The method of opposing a discharge is by specifications filed by parties in interest, setting out the grounds of opposition with reasonable particularity, and giving such facts as will enable the bankrupt to defend himself. This raises the issues of law and fact, the statements of the specifications being presumed to be denied by the bankrupt, and no further step is required of the bankrupt. He can raise legal questions by motion to dismiss.

The act requires the judge to hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest. Under this language the question must be raised by formal specifications in opposition. These must set out the grounds on which the discharge is opposed with reasonable particularity, giving such necessary facts in connection with the general charge as will enable the bankrupt to defend himself. The party opposing cannot merely come in and follow the language of the statute defining the grounds of opposition to a bankrupt's discharge.[9]

[8] In re Clisdell (D. C.) 101 Fed. 246; ante, p. 94, note 18, and p. 102, note 41. *See "Bankruptcy," Dec. Dig. (Key-No.) § 405; Cent. Dig. §§ 709–711.*

[9] In re Goodale (D. C.) 109 Fed. 783; In re Peck (D. C.) 120 Fed. 972; In re Bromley (D. C.) 152 Fed. 493. *See "Bankruptcy," Dec. Dig. (Key-No.) § 413; Cent. Dig. §§ 712–727.*

But though the specifications are vague and indefinite, the bankrupt cannot go to trial on them in the lower court, and raise this objection to them for the first time in the appellate court.[10]

The court may, in its discretion, allow the specifications to be amended so as to make them more definite, but it is not apt to exercise this discretion in this manner where the creditors have been guilty of laches.[11]

When the specifications are filed, it is not necessary for the bankrupt to join any formal issue thereon. As far as they raise questions of fact, they are presumed to be denied by the bankrupt, and his failure to file a formal paper denying them is not an admission of their validity, and would not authorize any default decree against him. As to questions of law, he need not file any paper in the nature of a demurrer. He can raise the questions before the court on motion to dismiss.[12]

SAME—BURDEN OF PROOF

69. The burden is upon creditors opposing a discharge to prove the facts necessary to defeat it by a preponderance of evidence clear and convincing.

There is some conflict of decision as to the quantity of evidence necessary to prove the ground alleged as opposition to the discharge. There can be no question that the

[10] In re Osborne, 115 Fed. 1, 52 C. C. A. 595. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 413, 458.*

[11] Id.; In re Glass (D. C.) 119 Fed. 509; In re Carley, 117 Fed. 130, 55 C. C. A. 146; Kentucky Nat. Bank v. Carley, 121 Fed. 822, 58 C. C. A. 158. Nor would an amendment adding a new ground of opposition be permitted after the 10 days allowed by the rule for filing them. In re Johnson (D. C.) 192 Fed. 356. *See "Bankruptcy," Dec. Dig. (Key-No.) § 413.*

[12] In re Logan (D. C.) 102 Fed. 876; In re Crist (D. C.) 116 Fed. 1007. *See "Bankruptcy," Dec. Dig. (Key-No.) § 413.*

burden of proof in the first instance is upon the creditor opposing it. It has been held in some cases that a fair preponderance of evidence is all that is necessary in order to sustain this burden of proof.[13] On the other hand, it has been held, on stronger reasoning, that, although the proof need not be such as to leave the matter beyond a reasonable doubt, it must be more than a mere preponderance, and must be clear and convincing.[14]

The grounds on which a discharge can be opposed are, in the main, grounds connected with the commission of a criminal offense, or the commission of some fraud. While the proceeding to show that a criminal offense has been committed as a means of defeating the discharge is not a criminal proceeding, it has the effect of fastening the commission of a crime upon the defendant. Hence it is not unreasonable to expect proof beyond that required in ordinary civil suits. The release of a debtor from a load of debt, and his restoration to the producing class of the community, are the fundamental reasons for the enactment of the bankrupt law, and the presumptions ought to be in favor of his discharge. Hence, while it might be too heavy a burden on the creditor to require the amount of proof necessary in criminal procedure, it is not putting too much upon him to require a degree of proof equal to that required for the proof of fraud in ordinary civil proceedings.

Policy as to Granting Discharge

The policy of the bankrupt court is in favor of granting a discharge. The act contemplates a speedy discharge, and the court will not permit creditors to unreasonably delay

[13] In re Leslie (D. C.) 119 Fed. 406; In re Dauchy (D. C.) 122 Fed. 688. *See "Bankruptcy," Dec. Dig. (Key-No.) § 414; Cent. Dig. §§ 720–722.*

[14] In re Corn (D. C.) 106 Fed. 143; In re Howden (D. C.) 111 Fed. 723; Garry v. Jefferson Bank, 186 Fed. 461, 108 C. C. A. 439; In re Taylor (D. C.) 188 Fed. 479. *See "Bankruptcy," Dec. Dig. (Key-No.) § 414; Cent. Dig. §§ 720–722.*

it. Nor will the court go out of its way to find grounds for refusing it.[15]

Collateral Weight of Discharge

A discharge is a personal privilege, like the statute of limitations; and therefore, when a creditor is sued, he must plead his discharge, or judgment will go against him, as in any other uncontested case.[16]

When a discharge is pleaded, the court in which it is pleaded must assume that the proceedings upon it were regular, and that proper notices were given. It cannot be attacked collaterally.[17]

GROUNDS OF OPPOSITION TO DISCHARGE

70. The general grounds of opposition to a discharge are, as prescribed by the statute:

(1) Commission of offenses against the bankrupt act.

(2) Intentional destruction or concealment of, or failure to keep, accounts.

(3) Obtaining money or property on credit by false statement in writing for that purpose.

(4) Removal, destruction, or concealment of property, with intent to hinder, delay, or defraud creditors, within four months previous to filing of petition.

(5) Prior discharge in bankruptcy within six years in voluntary proceedings.

[15] In re Mudd (D. C.) 105 Fed. 348; In re Hixon (D. C.) 93 Fed. 440; Hardie v. Swafford Bros. Dry Goods Co., 165 Fed. 588, 91 C. C. A. 426, 20 L. R. A. (N. S.) 785. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 407, 415.*

[16] Fowle v. Park (C. C.) 48 Fed. 789; In re Wesson (D. C.) 88 Fed. 855; Friedman v. Zweifler, 74 Misc. Rep. 448, 132 N. Y. Supp. 320; Heelman v. Goldstone, 161 Fed. 913, 88 C. C. A. 604. *See "Bankruptcy," Dec. Dig. (Key-No.) § 435; Cent. Dig. §§ 824–839.*

[17] Jarecki Mfg. Co. v. McElwaine (C. C.) 107 Fed. 249; First National Bank v. Masterson, 29 Okl. 76, 116 Pac. 162. *See "Bankruptcy," Dec. Dig. (Key-No.) § 419; Cent. Dig. §§ 843–852.*

(6) Refusal to obey lawful order of, or to answer any material question approved by, the court in the course of the bankruptcy proceedings.

These are set out in section 14 of the act, par. "b." As originally enacted, it read as follows:

"(b) The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed or failed to keep books of account or records from which his true condition might be ascertained."

The acts of February 5, 1903, and June 25, 1910, have radically changed this section, not only in language, but by the addition of several grounds not contained in the original act, so that it now reads as follows:

"(b) The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person; or (4) at any time subsequent to the first day of the four months im-

mediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of, or to answer any material question approved by the court: Provided, that a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose."

In considering the grounds of opposition, it is important to remember the distinction between the right to a discharge and its effect when granted. The right to it is governed by the above-quoted section, and the only grounds of opposition are those therein contained. The fact that a discharge does not affect certain debts is no reason why the holders of such debts should oppose it, as they are unaffected by it. For instance, the omission of creditors from the list, unless done intentionally, so as to make the swearing to the list a false oath, is no ground for refusing a discharge, because a discharge does not affect the right of such creditor to subsequently sue the bankrupt.[18] Nor is the existence of unprovable debts a ground for opposing the granting of a discharge, as such discharge, when granted, is no defense against them.[19]

Nor can the question of the effect of a discharge be considered on an application for it. Such questions will properly come up when the bankrupt pleads it in defense to a

[18] In re Monroe (D. C.) 114 Fed. 398; In re Blalock (D. C.) 118 Fed. 679. *See "Bankruptcy," Dec. Dig. (Key-No.) § 407.*

[19] In re Tinker (D. C.) 99 Fed. 79; Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754; In re Black (D. C.) 97 Fed. 493; In re Carmichael (D. C.) 96 Fed. 594. *See "Bankruptcy," Dec. Dig. (Key-No.) § 407.*

suit brought against him, but are not proper issues on an application to the court to obtain it.[20]

Commission of Offense as Ground of Opposition

The first ground specified on which a discharge can be opposed is that the bankrupt "has committed an offense punishable by imprisonment as herein provided." The offenses against the bankrupt act are set out in section 29 of the act. So far as they relate to the bankrupt himself, the first two named in paragraph "b" are practically the only ones which can be urged against a discharge. The first of these is, having knowingly and fraudulently concealed while a bankrupt, or, after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy. Mere proof of the existence of property not reported by the bankrupt is not sufficient to defeat his discharge on this ground. It must be proved to have been knowingly and fraudulently concealed. It is not sufficient to prove simply former possession of the property by the bankrupt, but present ownership as well must be shown.[21]

The offense of fraudulent concealment may be proved from the bankrupt's statements on his examination, and those statements can be used against him for that purpose, as the proceeding is not a criminal proceeding.[22]

The second offense relating to the bankrupt is having knowingly and fraudulently made a false oath or account in or in relation to any proceeding in bankruptcy. This offense is committed when the bankrupt purposely omits property from his sworn schedules.[23]

[20] In re Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38; In re McCarty (D. C.) 111 Fed. 151. *See "Bankruptcy," Dec. Dig. (Key-No.) § 407.*

[21] In re Idzall (D. C.) 96 Fed. 314; In re Patterson (D. C.) 121 Fed. 921. *See "Bankruptcy," Dec. Dig. (Key-No.) § 408.*

[22] In re Leslie (D. C.) 119 Fed. 406; Shaffer v. Koblegard Co., 183 Fed. 71, 105 C. C. A. 363. *See "Bankruptcy," Dec. Dig. (Key-No.) § 414.*

[23] Osborne v. Perkins, 112 Fed. 127, 50 C. C. A. 158; In re Becker (D. C.) 106 Fed. 54; Id., 112 Fed. 1020, 50 C. C. A. 666; In re Sem-

It is not committed, however, by the omission of property from a mere mistake.[24]

The failure to schedule property fraudulently transferred is a violation of the act in this respect.[25]

The omission of property from the schedules must be intentional and fraudulent, in order to constitute this offense.[26]

A false oath must be one material to the bankruptcy proceeding.[27]

Here, too, the offense may be proved, as far as the question of a discharge is concerned, by the bankrupt's statements in his examination, and they may be used against him for that purpose.[28]

Failure to keep accounts, etc.

The second ground of opposition to the bankrupt's discharge is the fraudulent failure to keep books of account, when in contemplation of bankruptcy. The amendment of February 5, 1903, has materially changed the language of this part of section 14, so that now in order to defeat a discharge on this ground, it is only necessary to prove that the bankrupt, with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained. The omission of the word "fraudulent" from the first draft

mel (D. C.) 118 Fed. 487; In re Reed (D. C.) 191 Fed. 920. *See "Bankruptcy," Dec. Dig. (Key-No.) § 408.*

[24] In re Morrow (D. C.) 97 Fed. 574; In re Freund (D. C.) 98 Fed. 81. *See "Bankruptcy," Dec. Dig. (Key-No.) § 408.*

[25] In re Skinner (D. C.) 97 Fed. 190; In re Gammon (D. C.) 109 Fed. 312. *See "Bankruptcy," Dec. Dig. (Key-No.) § 408.*

[26] In re Eaton (D. C.) 110 Fed. 731. *See "Bankruptcy," Dec. Dig. (Key-No.) § 408.*

[27] Bauman v. Feist, 107 Fed. 83, 46 C. C. A. 157; In re Blalock (D. C.) 118 Fed. 679; In re Chamberlain (D. C.) 180 Fed. 304. *See "Bankruptcy," Dec. Dig. (Key-No.) § 408.*

[28] In re Dow's Estate (D. C.) 105 Fed. 889; In re Gaylord, 112 Fed. 668, 50 C. C. A. 415; U. S. v. Brod (C. C.) 176 Fed. 169. *See "Bankruptcy," Dec. Dig. (Key-No.) § 414.*

of the act does not materially change it, for, even under this amendment, any such intent as that defined would be fraudulent. But the omission of the words "in contemplation of bankruptcy" does very materially change the original act, and defeats a discharge for improper concealment or destruction of books, though not in contemplation of bankruptcy. This change was probably made in consequence of the fact that the courts had not entirely agreed as to the meaning of this phrase. For instance, in Re Shertzer [29] it was held that contemplation of bankruptcy was by no means the equivalent of contemplation of insolvency, thereby implying that even proof of insolvency at the time would not be sufficient. On the other hand, it had been held that a bankrupt who failed to keep such books when he must have known that he was hopelessly insolvent must be presumed to have done it fraudulently and in contemplation of bankruptcy.[30]

The amendment adopts this latter construction of the act, and renders the task of the opposing creditor, to that extent, easier. The mere failure to keep books under the original act, or the keeping of insufficient and inaccurate books, was not of itself sufficient to defeat a discharge on this ground—certainly in case of a business where the keeping of an elaborate set of books was not necessary. The failure must have been with fraudulent intent.[31]

The actual destruction of books would defeat an application under this clause.[32]

The delinquency which will defeat a discharge on this

[29] (D. C.) 99 Fed. 706. *See "Bankruptcy," Dec. Dig. (Key-No.) § 409.*

[30] In re Kenyon (D. C.) 112 Fed. 658; In re Feldstein, 115 Fed. 259, 53 C. C. A. 479. See, also, In re Marcus (D. C.) 192 Fed. 743. *See "Bankruptcy," Dec. Dig. (Key-No.) § 409.*

[31] In re Idzall (D. C.) 96 Fed. 314; In re Corn (D. C.) 106 Fed. 143; In re Lafleche (D. C.) 109 Fed. 307. *See "Bankruptcy," Dec. Dig. (Key-No.) § 409.*

[32] In re Conley (D. C.) 120 Fed. 42. *See "Bankruptcy," Dec. Dig. (Key-No.) § 409.*

ground must be a personal delinquency of the bankrupt. For instance, in the case of a partnership, the failure of one partner to keep proper books would not defeat the application of an innocent partner for his discharge.[33]

Where a husband conducted the business of his wife, she leaving everything to him and being innocent herself, his failure to keep proper books would not defeat her application.[34]

Other Grounds

The new grounds specified in the amendments of February 5, 1903, and June 25, 1910, hardly require discussion.[35]

THE DEBTS NOT AFFECTED BY A DISCHARGE

71. The debts not affected by a discharge in bankruptcy are taxes, liabilities for obtaining property by false pretenses or false representations, or for willful or malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; also improperly scheduled debts and fiduciary debts.

Section 17 of the act prescribes the effect of a discharge when granted. The second subdivision in the original act reads: "are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another."

[33] In re Schultz (D. C.) 109 Fed. 264. *See "Bankruptcy," Dec. Dig. (Key-No.) § 409.*

[34] In re Hyman (D. C.) 97 Fed. 195. *See "Bankruptcy," Dec. Dig. (Key-No.) § 409.*

[35] See, as illustrations, Hardie v. Swafford Bros. Dry Goods Co., 165 Fed. 588, 91 C. C. A. 426, 20 L. R. A. (N. S.) 785; In re Reed (D. C.) 191 Fed. 920. *See "Bankruptcy," Dec. Dig. (Key-No.) § 407.*

This subdivision has been changed by the act of February 5, 1903, to read as follows: "are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation."

This amendment was evidently intended to meet the course of decisions on the original act. It seemed to contemplate that the only other liabilities which were unaffected by the discharge were those which had been reduced to judgment. Under its original form, the courts held that, if it did not cover debts not reduced to judgment, they would give the creditor time to reduce his claim to judgment, so that the discharge could not affect them.[36]

There had been some conflict of decisions on the question what constitutes a willful and malicious injury to the person. In Re Tinker,[37] it had been questioned whether this phrase would cover damages in an action of crim. con. as that would hardly be said to be a willful or malicious injury to the person of the husband. On the other hand, in Re Freche,[38] it had been held that damages recovered for the seduction of a daughter did come within this language, and in Re Maples[39] it was held that a judgment by an unmarried woman for her own seduction, un-

[36] In re Cole (D. C.) 106 Fed. 837; In re Wollock (D. C.) 120 Fed. 516. As to false representations, see FORSYTH v. VEHMEYER, 177 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 423, 424.*

[37] (D. C.) 99 Fed. 79. But the question of the effect of this same discharge was decided in Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754, to the effect that such cause of action was not barred by a discharge. *See "Bankruptcy," Dec. Dig. (Key-No.) § 424.*

[38] (D. C.) 109 Fed. 620. *See "Bankruptcy," Dec. Dig. (Key-No.) § 424.*

[39] (D. C.) 105 Fed. 919. *See "Bankruptcy," Dec. Dig. (Key-No.) § 424.*

der a Montana statute giving such a right of action, was a willful and malicious injury to her person or property. These questions are set at rest by the amendment.

However, if there is a liability for an alleged fraudulent transaction, and the creditor, waiving the fraud, closes it by taking promissory notes of the debtor, and then gets judgment on the notes, that is not a judgment in an action for fraud, in the sense of the original act.[40]

Another class of debts not affected by a discharge is the unscheduled debts, unless the creditor had notice or actual knowledge of the bankruptcy proceedings.[41]

The last class mentioned is debts created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity. The fraud contemplated in this subdivision and the previous one means actual, positive fraud, involving moral turpitude, not mere constructive fraud or fraud in law.[42]

The debts contemplated by this subdivision are those arising on actual, technical trusts, and were not intended to cover trusts arising from mere relations of confidence, though that may be the colloquial sense of the term.[43]

For this reason, debts due by a commission merchant or broker to customers for property of theirs which he has

[40] Hargadine-McKittrick Dry Goods Co. v. Hudson, 122 Fed. 232, 58 C. C. A. 596. *See "Bankruptcy," Dec. Dig. (Key-No.) § 423.*

[41] Such knowledge, to affect the creditor, must be acquired before the discharge. Knowledge later, though in time to prove his debt and move to revoke the discharge, is not enough. Birkett v. Bank, 195 U. S. 345, 25 Sup. Ct. 38, 49 L. Ed. 231. The omission from the schedule of the creditor's residence when known and the creditor's ignorance of the proceedings prevent his claim from being affected by the discharge. Miller v. Guasti, 226 U. S. 170, 33 Sup. Ct. 49, 57 L. Ed. ——. *See "Bankruptcy," Dec. Dig. (Key-No.) § 425.*

[42] Ames v. Moir, 138 U. S. 306, 11 Sup. Ct. 311, 34 L. Ed. 951; Bullis v. O'Beirne, 195 U. S. 606, 25 Sup. Ct. 118, 49 L. Ed. 340. *See "Bankruptcy," Dec. Dig. (Key-No.) § 426.*

[43] Bracken v. Milner (C. C.) 104 Fed. 522; In re Butts (D. C.) 120 Fed. 966. *See "Bankruptcy," Dec. Dig. (Key-No.) § 426; Cent. Dig. §§ 791–807.*

sold are not debts contracted in a fiduciary capacity, in the sense of the statute.[44]

REVOCATION OF A DISCHARGE

72. Under section 15 of the act, the judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial, if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

This evidently contemplates a showing on the proceeding for a revocation nearly as strong as that necessary to secure a new trial at common law on the ground of after-discovered evidence. The ignorance of creditors alone is not enough, if the facts on which they base their motion to revoke were known to the trustee, as he represents them to this extent.[45]

A fraud long prior to the adjudication in bankruptcy is not such a one as is contemplated by this section.[46]

A creditor who has not proved his claim is sufficiently a party in interest to move for a revocation, and the court itself, if it thinks that there are sufficient reasons for it, may revoke the discharge within the year.[47]

[44] In re Basch (D. C.) 97 Fed. 761; Knott v. Putnam (D. C.) 107 Fed. 907; Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147. *See "Bankruptcy," Dec. Dig. (Key-No.) § 426.*

[45] In re Hansen (D. C.) 107 Fed. 252. As to the effect of laches on the part of creditors, see In re Mauzy (D. C.) 163 Fed. 900. *See "Bankruptcy," Dec. Dig. (Key-No.) § 417; Cent. Dig. §§ 867–871.*

[46] In re Hoover (D. C.) 105 Fed. 354. *See "Bankruptcy," Dec. Dig. (Key-No.) § 417.*

[47] In re Bimberg (D. C.) 121 Fed. 942. *See "Bankruptcy," Dec. Dig. (Key-No.) § 417.*

But if the bankrupt has fraudulently concealed or failed to list his property, and this fact is found out by the creditors after the granting of the discharge, and could not have been found out before, then the discharge may be revoked.[48]

[48] In re Meyers (D. C.) 100 Fed. 775. The fraud must be actual, such as would defeat the grant of a discharge. In re Wright (D. C.) 177 Fed. 578. *See "Bankruptcy," Dec. Dig. (Key-No.) § 417.*

CHAPTER IX

THE DISTRICT COURT (Continued)—PARTICULAR CLASSES OF JURISDICTION

73. Claims against the United States—Proper Forum.
74. Same—The Subjects of Jurisdiction.
75. Same—The Procedure.
76. Same—The Appeal.
77. Same—The Proper Appellate Court.
78. Suits to Abate Unlawful Inclosures of Public Lands.
79. Suits under Immigration Laws.
80. Suits against Restraints and Monopolies.
81. Claims of Indians for Lands under Treaties.
82. Suits against United States for Partition.
83. Suits under Chinese Exclusion Laws.
84. Unclassified Cases.

CLAIMS AGAINST THE UNITED STATES—PROPER FORUM

73. All suable claims against the United States may be prosecuted in the court of claims, which is located in Washington. The district court has concurrent jurisdiction with this court over such claims in certain classes of cases fixed by law; the jurisdiction of the district court being limited to cases involving not over ten thousand dollars.

Until the act of March 3, 1887, known as the "Tucker Act," [1] the only court which had jurisdiction of claims against the United States was the court of claims. This act, however, gave to the district and circuit courts concurrent jurisdiction with the court of claims, the jurisdiction of the district court being limited to cases involving

[1] 24 Stat. 505, c. 359 (U. S. Comp. St. 1901, p. 752).

not over one thousand dollars, and the jurisdiction of the circuit court to cases over that amount up to ten thousand dollars. Then paragraph 20, § 24, of the Judicial Code, gives jurisdiction to the district court up to ten thousand dollars. The theory of this act is to give the litigant an opportunity of asserting his claim against the government in a more convenient forum than the court of claims, which may be far distant from him.

SAME—THE SUBJECTS OF JURISDICTION

74. The act gives jurisdiction on claims founded on the Constitution or laws of the United States, upon contracts, express or implied, in cases not sounding in tort, except in war claims and claims adversely acted upon by other government agencies authorized to act. Claims for pensions, also, are excepted from the general class of jurisdiction.

The clause of this section on which jurisdiction is most commonly based is the clause giving jurisdiction for claims founded "upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court." This includes only money demands. It does not give any of the courts jurisdiction in equity to compel the issue and delivery of a patent for public lands, nor to cancel a judgment lien in favor of the United States illegally placed upon an

individual's land by a government officer, nor to decree specific performance.[2]

Claims for a Tort

Claims for a tort are expressly excluded, and this regardless of the mere form of pleading which the plaintiff may adopt. For instance, a suit by a person who, while in a government building, is injured by the fall of a government elevator, cannot be sustained, though allegations may be made that there was a promise of the government to carry the plaintiff safely.[3] In order to sustain the jurisdiction on the ground of an implied contract, there must be some element of contract in the case. For instance, suit may be brought for the value of property taken or used by the government without compensation, where no adverse title to the property is set up by the government, for there is an implied contract with the government to pay for property so taken or used.[4]

On the other hand, when the claimant's right to the property is denied, and the government takes it under the assertion of a right to use it, then the action is in tort, and cannot be sustained on the theory of an action for use and occupation; nor can it be made an action on contract by merely alleging an implied promise to pay under such circumstances.[5]

[2] U. S. v. Jones, 131 U. S. 1, 9 Sup. Ct. 669, 33 L. Ed. 90; Holmes v. U. S. (D. C.) 78 Fed. 513; District of Columbia v. Barnes, 197 U. S. 146, 25 Sup. Ct. 401, 49 L. Ed. 699; Plain v. Horne (C. C.) 196 Fed. 582. *See "Courts," Dec. Dig. (Key-No.) §§ 426, 449; Cent. Dig. §§ 1131, 1163–1169.*

[3] BIGBY v. U. S., 188 U. S. 440, 23 Sup. Ct. 468, 47 L. Ed. 519. *See "Courts," Dec. Dig. (Key-No.) § 426; "United States," Dec. Dig. (Key-No.) § 69.*

[4] U. S. v. Great Falls Mfg. Co., 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846; U. S. v. Buffalo Pitts Co., 193 Fed. 905, 114 C. C. A. 119. *See "Courts," Dec. Dig. (Key-No.) § 426; "United States," Dec. Dig. (Key-No.) § 69.*

[5] Hill v. U. S., 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. Ed. 862; Ribas y Hijo v. U. S., 194 U. S. 315, 24 Sup. Ct. 727, 48 L. Ed. 994; Cole-

This distinction is illustrated by the decisions in reference to the use of a patent by the government. Where the use is with the consent of the patentee, a promise to pay is implied, and suit is maintainable; but, where the use is without the consent of the patentee, a suit by the patentee is in tort, and not sustainable, though he may choose to frame his pleadings on the theory of an implied contract.[6] And a suit for an injury equivalent to a taking of the property without compensation, where the government does not deny the title, is within the statute.[7] A suit by a contractor for extra work, and damages caused by the interference of a government agent during the work—the contractor having a contract with the government—is sustainable as an action of contract.[8] So as to a suit for salvage to government property.[9]

In suits in the court of claims it had been held that the government could plead a counterclaim and recover judgment on it.[10] The Judicial Code extends this right to the government as to any cross-demand, no matter how irrelevant to the original claim.

Under the original act it was held that these suits must

man v. U. S., 181 Fed. 599. *See "United States," Dec. Dig. (Key-No.) § 127; Cent. Dig. § 116.*

[6] U. S. v. Palmer, 128 U. S. 262, 9 Sup. Ct. 104, 32 L. Ed. 442; Schillinger v. U. S., 155 U. S. 163, 15 Sup. Ct. 85, 39 L. Ed. 108; U. S. v. Société Anonyme Des Anciens Établissements Cail, 224 U. S. 309, 32 Sup. Ct. 479, 56 L. Ed. 778. *See "United States," Dec. Dig. (Key-No.) § 97; Cent. Dig. § 76.*

[7] U. S. v. LYNAH, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539. *See "Courts," Dec. Dig. (Key-No.) §§ 415, 426.*

[8] Bowe v. U. S. (C. C.) 42 Fed. 761. *See "United States," Dec. Dig. (Key-No.) § 95; Cent. Dig. § 74.*

[9] U. S. v. Cornell Steamboat Co., 202 U. S. 184, 26 Sup. Ct. 648, 50 L. Ed. 987; Hartford & N. Y. Transp. Co. v. U. S. (C. C.) 138 Fed. 618; U. S. v. Morgan, 99 Fed. 570, 39 C. C. A. 653. *See "Courts," Dec. Dig. (Key-No.) §§ 415, 426.*

[10] Steele v. U. S., 113 U. S. 128, 5 Sup. Ct. 396, 28 L. Ed. 952; U. S. v. Burchard, 125 U. S. 176, 8 Sup. Ct. 832, 31 L. Ed. 662. *See "United States," Dec. Dig. (Key-No.) § 130; Cent. Dig. § 118.*

be brought within six years after the right of action accrues, but the additional time allowed by the saving clause of section 1069 [11] of the United States Revised Statutes to persons beyond seas and under disability is also to be taken into account.[12] This construction has been embodied in the Judicial Code, in section 24, par. 20.

Concurrent Jurisdiction

The jurisdiction of the district court within the pecuniary limits above mentioned is coincident with the court of claims, except that it cannot take cognizance of cases brought to recover fees, salary, or compensation for official services of officers of the United States, or their assigns; the idea probably being that suits of this sort can best be asserted at the seat of government, where the court of claims is located.

Claims by an Alien

It is an interesting question whether an alien can sue under this act in the district court. In favor of his right to sue, it may be said that he certainly has the right to sue in the court of claims, provided his own country permits a similar privilege to citizens of this country. This right is given by section 1068 of the Revised Statutes. Then the act gives the district court concurrent jurisdiction with the court of claims, excepting only suits by officers. If the act stopped here, the right of an alien to sue would be clear, but the fifth section of the original act (continued in force by section 297 of the Judicial Code) requires the petition to be filed "in the district where the plaintiff resides." A resident alien, therefore, could undoubtedly sue, but whether an alien who merely comes into the United States for a temporary purpose can sue, and, if so, where, is a more difficult question. For instance, there have been some

[11] U. S. Comp. St. 1901, p. 740.

[12] U. S. v. Greathouse, 166 U. S. 601, 17 Sup. Ct. 701, 41 L. Ed. 1130. *See "Limitation of Actions," Dec. Dig. (Key-No.) § 3.*

cases of British captains towing in government light-ships, and then claiming salvage upon them. Such aliens resided in no district, and yet public policy would seem to require that they should be encouraged to render such salvage services. Such a case was that of The Viola,[18] but the question of jurisdiction was not raised in the case. In any event, it would seem clear that if such a suit is brought, and the United States by an authorized officer appears and defends on the merits, the court would have jurisdiction of the case; the question of the district in which to sue being a question of personal jurisdiction, and not jurisdiction over the subject-matter, and therefore one which can be waived.

SAME—THE PROCEDURE

75. A suit under this act is instituted by filing a petition in the proper court duly verified, and setting out the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of his case.

A copy of this petition must be served upon the district attorney of the United States in the district where the suit is brought, and another copy must be mailed by registered letter to the Attorney General, and proof of this fact, by affidavit of the service and mailing of the letter, must be filed with the clerk of the court.

The district attorney must then appear within sixty days after the service and make defense, unless the court gives him further time. But no judgment by default can be taken in case he does not. It is still necessary to prove the claim to the satisfaction of the court. The trial is by the court

[18] (C. C.) 32 Fed. 172; 55 Fed. 829, 5 C. C. A. 283. See, also, New York & O. S. S. Co. v. U. S. (D. C.) 202 Fed. 311; Reid Wrecking Co. v. U. S. (D. C.) 202 Fed. 315. *See "Aliens," Dec. Dig. (Key-No.) § 16; "Courts," Dec. Dig. (Key-No.) §§ 268, 426.*

without a jury, and it is its duty to cause a written opinion to be filed in the case, setting forth the specific findings of the court on the facts, and its conclusions upon the questions of law involved, and to render judgment thereon.[14] The court must proceed according to the nature of the cause of action asserted, whether at common law, in equity, or admiralty.

SAME—THE APPEAL

76. On the decision of the case, either the plaintiff or the United States may have the right of appeal or writ of error, according to the nature of the case.

Section 9 of the original act gave a right of appeal to either side, and conformed the procedure and the question whether to go up by appeal or writ of error to the general laws on the subject. This section is repealed by the Judicial Code, evidently because it is superfluous.

In Chase v. United States [15] the question was presented whether the course of review in such case should be by appeal, or whether it could also be by writ of error. It was decided that the method of review depended upon the nature of the case. If it was in its nature a common-law case, the review should be by writ of error. If it was an equity or admiralty case, the review should be by appeal. This test, while clear enough on principle, may frequently be difficult to apply in practice. The only pleadings are petition and answer, and there are so many instances where courts of common law, courts of equity, and courts of ad-

[14] This finding may be in the form of a decree and an opinion separate from the decree. U. S. v. Hyams, 146 Fed. 15, 76 C. C. A. 523. *See "United States," Dec. Dig. (Key-No.) § 143.*

[15] 155 U. S. 489, 15 Sup. Ct. 174, 39 L. Ed. 284. See, also, U. S. v. Harsha, 172 U. S. 567, 19 Sup. Ct. 294, 43 L. Ed. 556. See, also, U. S. v. Swift, 139 Fed. 225, 226, 71 C. C. A. 351; Price v. U. S., 169 Fed. 791, 95 C. C. A. 257. *See "Courts," Dec. Dig. (Key-No.) § 356; "United States," Dec. Dig. (Key-No.) § 146.*

miralty have concurrent jurisdiction, that it may often be difficult to decide in a given case whether the case is in its nature a common-law, an equity, or an admiralty suit. For instance, suppose the case of towing in a disabled lightship at the request of the crew aboard; if the vessel were not a government vessel, the party rendering the service could sue on a simple contract of employment at common law, or could sue in personam or in rem in an admiralty court for salvage. So, too, if the government should charter some vessel and the owner should sue for the charter money, that would be a suit of which either a common-law or an admiralty court might have jurisdiction. In such cases either method of review would probably be safe.

SAME—THE PROPER APPELLATE COURT

77. The proper appellate court in such cases, where no special question is involved, is the circuit court of appeals.

The court to which appeals from decisions of the district court should now be taken, where no special question is involved, is the circuit court of appeals. Prior to the act of March 3, 1891,[16] establishing that court, the Supreme Court had held that an appeal went from the district court to the Supreme Court, regardless of the amount involved, basing it upon the rule applicable to the court of claims.[17] Chase v. United States,[18] though not decided until 1894, was an appeal from a judgment rendered in November, 1890. But the fourth section of the act of March 3, 1891 (left in force by the Judicial Code), establishing the circuit

[16] U. S. Comp. St. 1901, p. 547.

[17] U. S. v. Davis, 131 U. S. 36, 9 Sup. Ct. 657, 33 L. Ed. 93. *See "Courts," Dec. Dig. (Key-No.) § 405.*

[18] 155 U. S. 489, 15 Sup. Ct. 174, 39 L. Ed. 284. *See "Courts," Dec. Dig. (Key-No.) § 405.*



courts of appeals, provides that judgments of the district courts are subject to review only in the Supreme Court of the United States, or in the circuit courts of appeals as therein provided. The fifth section, as modified by section 238 of the Judicial Code, gives the Supreme Court jurisdiction only in special cases, involving mainly jurisdictional or constitutional questions. The sixth section, as modified by section 128 of the Judicial Code, provides that the circuit court of appeals shall review the final decisions of the district court in all cases other than those that can be taken direct to the Supreme Court, unless otherwise provided by law. Under these different provisions appeals should go to the circuit court of appeals, unless there was some special ground of jurisdiction in the Supreme Court like those mentioned in the fifth section.[19]

Bigby v. United States[20] went to the Supreme Court because there was a certificate that the jurisdiction of the court was in issue.

The case goes up for review simply on the findings of the court as to the facts and law, which is much like a special verdict.[21] These decisions probably mean nothing more than that the plaintiff cannot take his whole case up on the evidence. They can hardly be presumed to mean that the lower court, by its opinion and findings, could shut out the review of rulings on legal questions. For instance, if the lower court should exclude evidence which it ought to have admitted, surely the plaintiff could take a bill of exceptions to such exclusion if the case were a common-law case, or make a formal tender of what he expected to prove in the depositions, and get the ruling of the court

[19] U. S. v. Harsha, 172 U. S. 567, 19 Sup. Ct. 294, 43 L. Ed. 556. *See "Courts," Dec. Dig. (Key-No.) § 405.*

[20] 188 U. S. 400, 23 Sup. Ct. 468, 47 L. Ed. 519. *See "Courts," Dec. Dig. (Key-No.) §§ 281, 405.*

[21] U. S. v. Kelly, 89 Fed. 946, 32 C. C. A. 441; Stone v. U. S., 164 U. S. 380, 17 Sup. Ct. 71, 41 L. Ed. 477. *See "Courts," Dec. Dig. (Key-No.) § 356; "United States," Dec. Dig. (Key-No.) § 146.*

thereon, if the case were in equity or admiralty, and have the appellate court review the action of the lower court for such error of law.

SUITS TO ABATE UNLAWFUL INCLOSURES OF PUBLIC LANDS

78. The district court is given certain statutory jurisdiction in suits to abate unlawful inclosures of public lands.

Under the act of February 25, 1885,[22] inclosures of public lands by parties not having any color of title thereto are forbidden, and it is made the duty of the district attorney to institute a civil suit in the proper district or circuit court in the name of the United States against the offender. Paragraph 21, § 24, of the Judicial Code, confers this jurisdiction on the district court. It provides that process may be served on any agent or employé who has charge or control of the inclosure. Under this act equity has jurisdiction to remove an illegal inclosure by mandatory injunction, or to prohibit the erection of any other by ordinary injunction.[23] The proceeding is a special statutory proceeding giving relief in a form unknown to the common-law courts. It is not available against any one who claims under a bona fide claim or color of title, nor can the legal validity of the defendant's title be settled in such a suit. As far as title is concerned, the only question which the court can consider is whether the defendant has a bona fide claim or color of title.[24]

[22] 23 Stat. 321, c. 149 (U. S. Comp. St. 1901, p. 1524).

[23] U. S. v. Brighton Ranch Co. (C. C.) 25 Fed. 465; Id. (C. C.) 26 Fed. 218. *See "Public Lands," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 25, 26.*

[24] U. S. v. Osborn (C. C.) 44 Fed. 29; Cameron v. U. S., 148 U. S. 301, 13 Sup. Ct. 595, 37 L. Ed. 459. *See "Public Lands," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 25, 26.*

The act forbids any inclosure of government lands, though the inclosure is brought about by fences erected on the claimant's own lands. For instance, where the claimant owned alternate sections and the other sections were owned by the government, it was held a violation of the act to build fences, on the claimant's own lands, a few inches off from the boundary, the result of which was to inclose the government's sections also; and this though the claimant supplied gates giving easy access to the government's sections, and though the claimant's object was a public one.[25]

SUITS UNDER IMMIGRATION LAWS

79. The twenty-second paragraph of section 24 of the Judicial Code confers on the district court jurisdiction of all suits and proceedings regulating the immigration of aliens, or under the contract labor laws.

The growing sentiment against indiscriminate immigration has resulted in gradually making the laws on the subject more stringent. The act of February 20, 1907,[26] regulates the subject in detail. The act of April 29, 1902,[27] as amended April 27, 1904,[28] applies only to Chinese immigration and residence. The third section of the act of February 20, 1907, punishing the keeping of an alien woman for purposes of prostitution within three years after her entry into the United States, is unconstitutional.[29] But the ninth

[25] Camfield v. U. S., 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260; Homer v. U. S., 185 Fed. 741, 108 C. C. A. 79. *See "Public Lands," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 25, 26.*

[26] 34 Stat. 898, c. 1134 (U. S. Comp. St. Supp. 1911, p. 499), amended March 4, 1909 (35 Stat. 969–982, c. 299), also March 26, 1910 (36 Stat. 263, c. 128 [U. S. Comp. St. Supp. 1911, p. 500]).

[27] 32 Stat. 176, c. 641 (U. S. Comp. St. Supp. 1911, p. 524).

[28] 33 Stat. 428, c. 1630.

[29] Keller v. U. S., 213 U. S. 138, 29 Sup. Ct. 470, 53 L. Ed. 737, 16

section, prohibiting the importation of aliens with dangerous diseases, is valid.[80]

SUITS AGAINST RESTRAINTS AND MONOPOLIES

80. The twenty-third paragraph of section 24 of the Judicial Code confers on the district court jurisdiction of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

These acts[81] have been the subject of many decisions. As they are based upon the power of Congress to regulate interstate commerce, they do not apply to trusts to regulate a local product which has not become the subject of commerce between the states.[82] The main act is the Sherman act of July 2, 1890.

It applies to agreements regulating rates, and to a pooling agreement between different common carriers engaged in interstate commerce,[83] but only to agreements directly connected with interstate commerce, including the transportation, purchase, sale, and exchange of commodities be-

Ann. Cas. 1066. But the amendment of March 26, 1910, is valid. Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165. *See "Aliens," Dec. Dig. (Key-No.) § 40; "Constitutional Law," Dec. Dig. (Key-No.) § 318.*

[80] Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 29 Sup. Ct. 671, 53 L. Ed. 1013. *See "Aliens," Dec. Dig. (Key-No.) § 40.*

[81] Act July 2, 1890, c. 647, § 4, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3201); Act Aug. 27, 1894, c. 349, § 73, 28 Stat. 570 (U. S. Comp. St. 1901, p. 3202).

[82] U. S. v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325. *See "Monopolies," Dec. Dig. (Key-No.) §§ 9, 10; Cent. Dig. §§ 8–10.*

[83] U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; U. S. v. Joint Traffic Ass'n, 171 U. S. 505, 569, 571, 19 Sup. Ct. 25, 43 L. Ed. 259. *See "Monopolies," Dec. Dig. (Key-No.) §§ 10–12.*

tween citizens of different states, and the instrumentalities by which such commerce is conducted.[34]

It applies to an agreement between private corporations engaged in different states in the manufacture and marketing among the different states of iron pipe.[35]

It applies to an agreement between manufacturers and dealers in tile grates and mantels in the different states, and controlling the price of products in those states.[36]

It applies to the organization of a holding corporation which bought up a controlling interest in two competing lines of transportation for the purpose of preventing competition between them.[37] It applies only to undue restraints of interstate or foreign commerce.[38] The decisions on the act have been numerous, ranging from tobacco to tubs.[39]

[34] Hopkins v. U. S., 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; Anderson v. U. S., 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300. *See "Monopolies," Dec. Dig. (Key-No.) §§ 10–12.*

[35] Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. *See "Monopolies," Dec. Dig. (Key-No.) §§ 10–12, 17.*

[36] W. W. Montague & Co. v. Lowry, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608. *See "Monopolies," Dec. Dig. (Key-No.) §§ 10–12, 17.*

[37] U. S. v. NORTHERN SECURITIES CO. (C. C.) 120 Fed. 721; ID., 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. *See "Monopolies," Dec. Dig. (Key-No.) §§ 8–10, 17.*

[38] Standard Oil Co. of New Jersey v. U. S., 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. *See "Monopolies," Dec. Dig. (Key-No.) § 12; Cent. Dig. § 10.*

[39] See, as examples, U. S. v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663; Standard Sanitary Mfg. Co. v. U. S., 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107; U. S. v. Union Pac. R. Co., 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124; U. S. v. Reading Co., 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243. *See "Monopolies," Dec. Dig. (Key-No.) §§ 8–20; Cent. Dig. §§ 8–14.*

CLAIMS OF INDIANS FOR LANDS UNDER TREATIES

81. The twenty-fourth paragraph of section 24 of the Judicial Code confers on the district court jurisdiction of actions, suits or proceedings involving the right of any Indian to any allotment of land.

This paragraph was amended December 21, 1911, by adding a sentence giving increased force to the judgment or decree in such cases.

This is one of the classes of jurisdiction transferred from the circuit court. These questions often get into the courts of the District of Columbia by proceedings against government officials.[40]

SUITS AGAINST UNITED STATES FOR PARTITION

82. The twenty-fifth paragraph of section 24 of the Judicial Code confers on the district court jurisdiction of suits in equity for partition where the United States is one of the tenants in common or joint tenants, the suit to be in the district where the land lies.

This was a jurisdiction formerly vested in the circuit court, and is based on the act of May 17, 1898.[41]

[40] See, as examples of such questions, Garfield v. U. S. ex rel. Goldsby, 211 U. S. 249, 29 Sup. Ct. 62, 53 L. Ed. 168; Ballinger v. U. S. ex rel. Frost, 216 U. S. 240, 30 Sup. Ct. 338, 54 L. Ed. 464; Henry Gas Co. v. U. S., 191 Fed. 132, 111 C. C. A. 612. *See "Courts," Dec. Dig. (Key-No.) § 449; "United States," Dec. Dig. (Key-No.) § 105.*

[41] 30 Stat. 416, c. 339 (U. S. Comp. St. 1901, p. 516).

SUITS UNDER CHINESE EXCLUSION LAWS

83. These are but a special class of immigration and alien suits, but are made the subject of a special section of the Judicial Code (section 25).

UNCLASSIFIED CASES

84. The statute contains a saving clause conferring on the district court any power or duty theretofore exercised by the circuit court.

Scattered through the federal statutes are provisions conferring on the circuit court jurisdiction to enforce the rights or duties thereby created. Section 289 of the Judicial Code having abolished the circuit court, such cases were protected by section 291, which reads:

"Wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts."

CHAPTER X

THE DISTRICT COURT (Continued)—JURISDICTION TO ISSUE CERTAIN EXTRAORDINARY WRITS

85. Ad Quod Damnum or Condemnation Proceedings.
86. Writ of Habeas Corpus.
87. Same—Federal Jurisdiction.
88. Same—When Jurisdiction Exercised.
89. Same—The Particular Federal Courts Having Jurisdiction to Issue.
90. Same—Procedure on Habeas Corpus.
91. Ne Exeat.

AD QUOD DAMNUM OR CONDEMNATION PROCEEDINGS

85. Under the federal statutes several proceedings by condemnation are authorized, the jurisdiction in these being now in the district court.

1. The Act of February 22, 1867 [1]

This authorizes the Secretary of War to purchase such real estate as is necessary for national cemeteries, or, in case he cannot agree with the owner, to enter upon and appropriate any real estate which in his judgment is suitable and necessary for such purpose. In order to secure the rights of the owner, the act provides that the Secretary of War, or the owners, may apply to the circuit or district court within any state or district where such real estate is located for the appointment of appraisers; and it gives the court power, upon such application, to so frame its proceedings as to secure a just and equitable appraisement. It further provides that on payment of the appraised value to the owner, or into court in case he refuses to take it, the

[1] Rev. St. §§ 4870–4872 (U. S. Comp. St. 1901, p. 3375).

title shall be vested in the United States, and its jurisdiction over such estate shall be exclusive.

Since the abolition of the circuit court by section 289 of the Judicial Code the proceeding is in the district court.

2. The Act of April 24, 1888 [2]

This provides for the condemnation of such property as is necessary to maintain, operate, or prosecute works for the improvement of rivers or harbors. It provides that the procedure shall be according to the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted, and also that they shall be in any court having jurisdiction of such proceedings.

The act of June 29, 1906,[3] extends this to the case of condemnations in the name of the United States for the benefit of private parties improving navigation.

3. The Act of August 1, 1888 [4]

This is much more general than either of the two preceding acts, and provides for condemnation proceedings, whether to procure real estate for the erection of a public building, or for any other public use. It provides that the jurisdiction of these proceedings shall be in the circuit or district wherein such real estate is located, and that the practice, pleadings, forms, and modes of proceeding shall conform as near as may be to the practice, pleadings, forms, and mode of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held. This is much the most general act, and the one under which these proceedings are usually instituted.

By section 7 of the act of June 17, 1902,[5] the Secretary of

[2] 25 Stat. 94, c. 194 (U. S. Comp. St. 1901, p. 3525).
[3] 34 Stat. 632 (U. S. Comp. St. Supp. 1911, p. 1544).
[4] 25 Stat. 357, c. 728 (U. S. Comp. St. 1901, p. 2516).
[5] 32 Stat. 389 (U. S. Comp. St. Supp. 1911, p. 666).

the Interior is authorized to resort to condemnation proceedings for irrigation purposes.

4. The Act of August 18, 1890 [6]

This provides for the condemnation by the Secretary of War of any land, or right pertaining thereto, needed for fortifications or coast defense. It assimilates the proceeding to the state practice, and provides that it shall be in any court having jurisdiction of such proceedings.

The United States have jurisdiction to condemn land for public purposes. This is an attribute of sovereignty, and essential to the exercise of its governmental powers. Without it the country might be at the mercy of a foreign enemy, and the internal administration of the government at the mercy of the separate states.[7]

The general principles which regulate all condemnation proceedings apply in these matters. It is not necessary to have a jury in the sense of a common-law jury of twelve men. The procedure may provide for a simple jury of inquest or commission to pass upon the single question of damages, and need not require unanimity.[8]

The property specially benefited may be charged with an equitable portion of the benefit, or the court may provide that the special benefits to the special tract may be set off against the damages.[9]

[6] 26 Stat. 316, c. 797 (U. S. Comp. St. 1901, p. 2518).

[7] CHAPPELL v. U. S., 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510; Burley v. U. S., 179 Fed. 1, 102 C. C. A. 429, 33 L. R. A. (N. S.) 807. *See "Eminent Domain," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 19–23.*

[8] CHAPPELL v. U. S., 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510; Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270; U. S. v. Beaty (D. C.) 198 Fed. 284. *See "Eminent Domain," Dec. Dig. (Key-No.) § 209; Cent. Dig. § 548.*

[9] Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170; Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270. Allowance may be made for injury to that part of the land not taken. U. S. v. Grizzard, 219 U. S. 180, 31 Sup. Ct. 162, 55 L. Ed. 165, 31 L. R. A. (N. S.) 1135. *See "Eminent Domain," Dec. Dig. (Key-No.) § 145; Cent Dig. §§ 378–389.*

An act of this sort need not require payment to the owner in advance of entry, but may give a right of entry on the land by the payment of money into court.[10]

The question what constitutes a public use has received a very liberal construction. In United States v. Gettysburg Electric Ry. Co.,[11] it was held that the preservation of the Gettysburg battlefield constituted such a public use, and that a statute authorizing the same was valid, and hence a procedure against a railway company, condemning part which had already been devoted by it to the public use, was upheld. So, in Shoemaker v. United States,[12] the validity of an act authorizing the condemnation of land for a public park in Washington City was upheld. As the District of Columbia is under national control, this decision is tantamount to the doctrine that, within lands over which the United States have exclusive jurisdiction, their power of eminent domain is as extensive as that of the states; but whether the United States would have jurisdiction to condemn a park in territory not under the exclusive jurisdiction of the federal government, as, for instance, in a state, is not settled by this decision.

An act of Congress authorizing condemnation proceedings may vest the power of condemnation in the federal courts, or may delegate it to the state courts.[13]

[10] Cherokee Nation v. Railway Co., 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295; U. S. v. O'Neill (D. C.) 198 Fed. 677. *See "Eminent Domain," Dec. Dig. (Key-No.) §§ 74–80; Cent. Dig. §§ 188–214.*

[11] 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576. Irrigation ditches, although for private parties, are a public use under the peculiar conditions of some of the arid states. Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171. *See "Eminent Domain," Dec. Dig. (Key-No.) §§ 41, 47; Cent. Dig. §§ 86, 130, 131.*

[12] 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170. *See "Eminent Domain," Dec. Dig. (Key-No.) § 41; Cent. Dig. § 86.*

[13] U. S. v. Jones, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015. *See "Eminent Domain," Dec. Dig. (Key-No.) §§ 5, 71; Cent. Dig. §§ 19–23, 180.*

A petition under these acts for the right to condemn should allege on its face the authority and the necessity for instituting the proceedings, and the importance of the property for the public use in contemplation.[14]

The above provision as to condemnation proceedings, assimilating them to state procedure to the same purpose, does not require absolute identity of procedure. They need only approximate the state procedure.[15]

A proceeding of this character is in nature a common-law proceeding, and hence is reviewable only by writ of error.[16]

WRIT OF HABEAS CORPUS

86. The general principles of habeas corpus in the federal courts are the same as those prevailing under the common law.

This writ is not a writ of error, and cannot be used to correct mere errors or irregularities in procedure. It raises only the question of jurisdiction, or power of the party to hold the applicant in custody.

Nature of the Writ

This is the writ which has played such an important part in the political and legal history of the English race. Its purpose is to inquire whether a subject is illegally restrained of his liberty. Though it affects criminal proceedings, it is in its nature a civil writ.[17] In order to au-

[14] In re Montgomery (D. C.) 48 Fed. 896; In re Manderson, 51 Fed. 501, 2 C. C. A. 490. *See "Eminent Domain," Dec. Dig. (Key-No.) § 191; Cent. Dig. §§ 509–518.*

[15] CHAPPELL v. U. S., 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510. *See "Courts," Dec. Dig. (Key-No.) § 341; Cent. Dig. § 899.*

[16] Murhard Estate Co. v. Portland & S. Ry. Co., 163 Fed. 194, 90 C. C. A. 64. *See "Eminent Domain," Dec. Dig. (Key-No.) § 251; Cent. Dig. § 658.*

[17] Cross v. Burke, 146 U. S. 82, 13 Sup. Ct. 22, 36 L. Ed. 896. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1, 3.*

thorize the issue of the writ, there must be some actual restraint of liberty. A leading case on this subject is Wales v. Whitney.[18] There a medical director in the navy, who resided in Washington, received a letter from the Secretary of the Navy notifying him that he was placed under arrest, and commanding him to remain within the limits of the city of Washington pending proceedings against him by court-martial. No actual process, however, was issued, and there was no seizure of his person. His right to the writ was denied, as there was nothing to show such a restraint as justified the issue of the writ, for it would have been impossible for the Secretary of the Navy or any one else, on the return to the writ, to say that he held custody of the applicant.

The fundamental underlying principle as to the issue of the writ is that it is not a writ of error, and cannot be used to correct mere errors or irregularities in procedure. It raises only the question of jurisdiction, or power of the party to hold the applicant in custody.[19] The Supreme Court has had occasion at almost every term to reiterate this principle, as the desperate struggles of convicted criminals to postpone the inevitable, result in constant applications by habeas corpus to review the action of the court or other body by whom the sentence has been imposed. Some illustrations of the method in which this general principle has been applied will better serve to show its limits. The courts will not permit it to be used as a means of collaterally questioning the propriety of injunction or-

[18] 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277. It does not lie while the prisoner is at large on bail. Sibray v. U. S., 185 Fed. 401, 107 C. C. A. 483. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 10–12.*

[19] Kelzo v. Henry, 211 U. S. 146, 29 Sup. Ct. 41, 53 L. Ed. 125; Harlan v. McGowin, 218 U. S. 442, 31 Sup. Ct. 44, 54 L. Ed. 1101, 21 Ann. Cas. 849; Glasgow v. Moyer, 225 U. S. 420, 32 Sup. Ct. 753, 56 L. Ed. 1147; Ex parte Spencer, 228 U. S. 652, 33 Sup. Ct. 709, 57 L. Ed. —. *See "Habeas Corpus," Dec. Dig. (Key-No.) §§ 4, 30, 96; Cent. Dig. §§ 4, 25, 81.*

ders.[20] It cannot be used for the purpose of reviewing a mere question of regularity on proceedings to punish for contempt. For instance, where a party had been punished for creating a disorder in the actual presence of the court, or for attempting to bribe a witness in a jury room or hall adjoining the courtroom, the writ was refused, as the court had jurisdiction to punish such contempts, and the question whether the contempt had actually been committed or not was a question of fact which could not be reviewed by such a writ.[21]

It cannot be used to review proceedings before a United States commissioner in the examination of a poor debtor on a judgment of a United States court, or in holding a party arrested under foreign extradition papers, if it appeared that the crime for which the party was extradited was one covered by the extradition treaty.[22]

It cannot be used as an appellate writ for the purpose of reviewing proceedings in court-martial, where the court-martial had jurisdiction of the crime.[23] But where the court was illegally constituted, as where a volunteer was being tried by a court composed entirely of regulars, such defect became jurisdictional, and habeas corpus would lie.[24]

[20] In re DEBS, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 19; Cent. Dig. § 17.*

[21] Ex parte Savin, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 92; Cent. Dig. §§ 81–96; "Contempt," Cent. Dig. § 219.*

[22] Stevens v. Fuller, 136 U. S. 468, 10 Sup. Ct. 911, 34 L. Ed. 461; Terlinden v. Ames, 184 U. S. 270, 22 Sup. Ct. 484, 46 L. Ed. 534. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 92; Cent. Dig. §§ 81–96; "Extradition," Cent. Dig. § 45.*

[23] WALES v. WHITNEY, 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277; In re Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636. *See "Habeas Corpus," Dec. Dig. (Key-No.) §§ 9, 92; Cent. Dig. §§ 10, 11, 81–96.*

[24] McClaughry v. Deming, 186 U. S. 49, 22 Sup. Ct. 786, 46 L. Ed. 1049. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 95; Cent. Dig. § 82.*

When, however, it is said that it will only review questions of the jurisdiction of a court or committing authority, it is not meant that it will not lie at all if the committing authority originally had jurisdiction. There are many cases where the committing authority had jurisdiction in the first instance over the general subject or crime, but had no jurisdiction to enter the special order complained of. In such case habeas corpus would lie to question the power to make such an order. For instance, in Re Bain [25] the court permitted the amendment of an indictment which had been regularly found in the first instance, and of which the trial court had jurisdiction. The Supreme Court held on habeas corpus that the effect of permitting the amendment of the indictment made it no indictment at all, as an indictment was not amendable, and that therefore any sentence entered upon such amended indictment was necessarily void, and habeas corpus would lie.

In Ex parte Nielsen [26] the proceedings were regular up to the sentence, but the accused was sentenced a second time for the same offense. The court permitted a habeas corpus in such case, as the error did not commence until after sentence.

Under state extradition proceedings it is usually competent to raise the question whether the party is a fugitive from justice on habeas corpus. The distinction is illustrated in the cases of Cook v. Hart [27] and Hyatt v. People.[28] In the first case extradition papers had been issued, and the accused had been taken back under them to the

[25] 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 30; Cent. Dig. § 25.*

[26] 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 31; Cent. Dig. § 27.*

[27] 146 U. S. 183, 13 Sup. Ct. 40, 36 L. Ed. 934. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 92; Cent. Dig. §§ 81–96; "Extradition," Cent. Dig. § 45.*

[28] 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657. *See "Habeas Corpus," Dec. Dig (Key-No.) § 92; Cent. Dig. §§ 82–96; "Extradition," Cent. Dig. § 45.*

state whence they were issued, and tried. The court held that in such case he could set up, in the state court where he was being tried, the defense that he was not a fugitive from justice, and would not be permitted to raise it by habeas corpus afterwards. In the second case, when he was arrested he resisted the attempt to take him back to the state of issue, and applied for a habeas corpus, showing that on the date when the crime was alleged to have been committed he was not within the state where it was alleged to have been committed. The court held that in such case the writ would lie. In fact, it is a general doctrine that the courts lean against considering, on habeas corpus, questions that could be raised before the committing or trying court, though, if the judgment of such court is absolutely void, the writ may issue.[29]

The writ will not lie to attack the validity of proceedings before a de facto judge.[30]

SAME—FEDERAL JURISDICTION

87. The federal courts have power to issue the writ in cases arising under the Constitution or laws of the United States, or in connection with federal process.

This jurisdiction is set out in section 753 of the Revised Statutes.[31] The federal courts have no general common-law jurisdiction to inquire into any restraint of liberty. They can only take cognizance on habeas corpus of questions arising under the Constitution or laws of the United States, or in connection with federal process. They can-

[29] Ex parte Nielsen, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118; Greene v. Henkel, 183 U. S. 249, 22 Sup. Ct. 218, 46 L. Ed. 177. *See "Habeas Corpus," Dec. Dig. (Key-No.) §§ 28, 94; Cent. Dig. §§ 23, 82, 92.*

[30] Ex parte Ward, 173 U. S. 452, 19 Sup. Ct. 459, 43 L. Ed. 765. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 28; Cent. Dig. § 23.*

[31] U. S. Comp. St. 1901, p. 592.

not consider questions of restraint of liberty arising simply from acts violating state laws or state constitutions.[82]

In Re Burruss [83] the court refused to consider the question of disputed right to the custody of a child, not depending in any way upon any federal law.

In Re Duncan [84] it refused to consider the question whether a law was passed according to the requirements of the state constitution, holding that such was not a federal question, and raised no question relating to due process of law.

In Andrews v. Swartz [85] the failure of a state to give an appeal in criminal cases was held not to raise a federal question, nor a violation of the provisions relating to due process of law, and therefore not to be questioned by habeas corpus.

In Howard v. Fleming [86] the same principle was repeated, where an attempt was made to question whether an indictment charged a crime in a state court, or whether it was due process of law to fail to instruct the jury on the question of the presumption of innocence.

In Ex parte Kinney [87] it was held that the violation of a state statute forbidding intermarriage between white and colored persons raised no federal question.

On the other hand, the court has given a liberal con-

[82] Storti v. Massachusetts, 183 U. S. 138, 22 Sup. Ct. 72, 46 L. Ed. 120. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45; "Courts," Cent. Dig. §§ 804, 990, 1376–1385.*

[83] 136 U. S. 586, 10 Sup. Ct. 850, 34 L. Ed. 500. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45; "Courts," Cent. Dig. §§ 1376–1385.*

[84] 139 U. S. 449, 11 Sup. Ct. 573, 35 L. Ed. 219. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45; "Courts," Cent. Dig. §§ 1376–1385.*

[85] 156 U. S. 272, 15 Sup. Ct. 389, 39 L. Ed. 422. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45.*

[86] 191 U. S. 126, 24 Sup. Ct. 49, 48 L. Ed. 121. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45.*

[87] 3 Hughes, 9, Fed. Cas. No. 7,825. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45.*

struction to the clause of section 753 of the Revised Statutes, allowing the writ where the applicant is in custody for an act done or committed in pursuance of a law of the United States in cases of urgency. In the great case of In re Neagle [88] it became necessary to protect Mr. Justice Field from violence while holding his court in California, and while going to and proceeding therefrom; and the department of justice appointed a special deputy to accompany him and protect him. There was no special federal statute authorizing the protection of judges in such cases. Neagle, while accompanying the judge, shot and killed a man by the name of Terry, who was in the act of making a brutal assault upon the judge, and who but a short time before had taken part in creating a disorder in the courtroom. Neagle was arrested in the state court and charged with murder. He was released on habeas corpus, the court holding that his custody was for an act done or committed in pursuance of a law of the United States, and that it could and should protect him on habeas corpus, under such circumstances.

In Boske v. Comingore [89] the court discharged on habeas corpus an internal revenue officer who had been arrested for refusing to produce records in a state court, holding that his right to refuse to produce the records depended upon the federal law.

Concurrent State Jurisdiction

But while the federal courts have jurisdiction to issue the writ in cases involving a federal question, the state courts have to a certain extent a concurrent jurisdiction with them. They are just as much as the federal courts

[88] 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55. See, also, Hunter v. Wood, 209 U. S. 205, 28 Sup. Ct. 472, 52 L. Ed. 747; Ex parte Bartlett (D. C.) 197 Fed. 98. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45; "Courts," Cent. Dig. §§ 1376–1385.*

[89] 177 U. S. 459, 20 Sup. Ct. 701, 44 L. Ed. 846. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45; "Courts," Cent. Dig. §§ 1376–1385.*

the guardians of rights arising under the federal Constitution, and are just as much required to enforce such rights as the supreme law of the land. Hence a party illegally restrained for an act involving his rights under the federal Constitution can appeal on habeas corpus to such state courts as have jurisdiction. But this is subject to the qualification that the state courts cannot issue a habeas corpus which would interfere with the custody of an officer of the federal court, or any officer of the United States, as such power would inevitably bring on conflict and hamper the powers of the federal government.[40]

In such case, if the state court decides against the federal right, an appeal lies to the Supreme Court under section 237 of the Judicial Code, which is the present form of the famous twenty-fifth section of the judiciary act of 1789.

SAME—WHEN JURISDICTION EXERCISED

88. While the federal courts have jurisdiction to issue the writ when a federal question is involved, they are disinclined to exercise that jurisdiction, and will not issue it except under special circumstances of urgency.

This principle applies with special force when they are asked to issue it to affect proceedings in state courts. They have more than once said that it is a delicate jurisdiction, and that all the presumptions are against interfering with the ordinary administration of justice in state courts. As a writ of error lies from the state court of last resort in case of a decision adverse to the federal right,

[40] Robb v. Connelly, 111 U. S. 624, 4 Sup. Ct. 544, 28 L. Ed. 542; In re Royall, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868; Minnesota v. Brundage, 180 U. S. 499, 21 Sup. Ct. 455, 45 L. Ed. 640. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45; "Courts," Cent. Dig. §§ 1376–1385.*

they will usually leave the applicant to his writ of error, as it gives him equal protection.[41]

In Re Wood [42] they refused to issue the writ when the federal question raised was that negroes were excluded from a jury contrary to the civil rights act. Such questions should be raised in the state court, and a writ of error taken in the event of an adverse decision.

In State of New York v. Eno [43] the writ was refused to a state prosecution for violation of an offense which could also have been punished in the federal court under the national banking act, the court holding that the proper process was writ of error.

In Baker v. Grice [44] the allegation of the application for the writ was that the Texas anti-trust law violated the federal Constitution. There was nothing to show that the applicant would be in any way prejudiced by leaving him to his writ of error, and he was accordingly left to that remedy.

In Minnesota v. Brundage [45] a writ of error was asked by a party arrested for a violation of a state act regulating the sale of dairy products, and the applicant was left to his writ of error for the same reason.

On the other hand, an instance of the special circumstances under which the writ issues is In re Medley.[46]

[41] Ex parte Blodgett (D. C.) 192 Fed. 77. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45.*

[42] 140 U. S. 278, 11 Sup. Ct. 738, 35 L. Ed. 505. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45.*

[43] 155 U. S. 89, 15 Sup. Ct. 30, 39 L. Ed. 80. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45; "Courts," Cent. Dig. §§ 1376–1385.*

[44] 169 U. S. 284, 18 Sup. Ct. 323, 42 L. Ed. 748. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45; "Courts," Cent. Dig. §§ 1376–1385.*

[45] 180 U. S. 499, 21 Sup. Ct. 455, 45 L. Ed. 640. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45; "Courts," Cent. Dig. §§ 1376–1385.*

[46] 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45; "Courts," Cent. Dig. §§ 1376–1385.*

There a state law had been passed changing materially the method of punishment, which made it amenable to the objection of being an ex post facto law. The change in the method of punishment, however, was left largely to the keeper of the prison, and could not, in the nature of things, be inflicted until after sentence. In such case the court held that the writ would lie, as it was too late then to assign errors to a judgment in the state court.

In re Loney [47] involved an application for the writ by a party who had been arrested in a state court for perjury in a congressional contested election case, the arrest being made immediately after he left the stand. The court held that such special circumstance authorized the issue of the writ.

In re Neagle [48] and Boske v. Comingore,[49] where the writ was allowed, have been mentioned in another connection.

SAME—THE PARTICULAR FEDERAL COURTS HAVING JURISDICTION TO ISSUE

89. Sections 751 and 752 of the Revised Statutes [50] give this power to the Supreme Court and the circuit courts and district courts and their several justices or judges within their respective jurisdictions, but by section 289 of the Judicial Code the circuit court is eliminated.

[47] 134 U. S. 372, 10 Sup. Ct. 584, 33 L. Ed. 949. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45; "Courts," Cent. Dig. §§ 1376–1385.*

[48] 135 U. S. 1, 10 Sup. Ct. 658, 35 L. Ed. 55. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45; "Courts," Cent. Dig. §§ 1376–1385.*

[49] 177 U. S. 459, 20 Sup. Ct. 701, 44 L. Ed. 846. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45; "Courts," Cent. Dig. §§ 1376–1385.*

[50] U. S. Comp. St. 1901, p. 592.

The district court can issue the writ only in its own territorial jurisdiction.[51] When it is asked from a single judge, he naturally is the more cautious not to interfere with proceedings in a state court. He is also more disinclined than courts usually are to pronounce a doubtful act of Congress unconstitutional.[52]

The Supreme Court also has jurisdiction to issue the writ; in fact, as the jurisdiction of the Supreme Court extends over the whole United States, a Supreme Court justice may issue it anywhere, though on the return he would be apt to refer it for final decision to the full court.[53]

For a long time there was no appeal to the Supreme Court in criminal matters; nor is there now, except as incidental to constitutional and other questions of that nature. In such cases it was cautious not to permit the writ to be used as a writ of error to the inferior federal courts. On application to it for the writ in such cases, it would only consider the jurisdiction of the court. In Ex parte Carll [54] it held that it would only consider the power of the lower authority to commit for the crime charged. In Re Lancaster [55] it refused to issue the writ to the circuit court when the writ attempted to raise a question on an indictment which could have been raised in the circuit

[51] Ex parte Gouyet (D. C.) 175 Fed. 230. *See "Habeas Corpus," Dec. Dig. (Key-No.) §§ 45, 48; Cent. Dig. §§ 38–45; "Courts," §§ 805, 1376–1385.*

[52] U. S. v. Ames (C. C.) 95 Fed. 453. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45; "Courts," Cent. Dig. §§ 805, 1376–1385.*

[53] Ex parte Clarke, 100 U. S. 399, 25 L. Ed. 715. This jurisdiction is in nature appellate, though not so in form. In re Virginia, 100 U. S. 339, 25 L. Ed. 676. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45; "Courts," Cent. Dig. §§ 990, 1376–1385.*

[54] 106 U. S. 521, 1 Sup. Ct. 535, 27 L. Ed. 288. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45; "Courts," Cent. Dig. §§ 805, 1376–1385.*

[55] 137 U. S. 393, 11 Sup. Ct. 117, 34 L. Ed. 713. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45; "Courts," Cent. Dig. §§ 1376–1385.*

court by motion to quash. In Re Swan,[56] which was a contempt proceeding for interfering with the custody of a federal receiver, it refused to discharge the applicant on habeas corpus.

The Supreme Court, also, is reluctant to issue the writ when an inferior court may do so with equal convenience.[57]

The circuit court of appeals has no authority to issue the writ as an independent proceeding, though it may to protect a jurisdiction acquired on other grounds.[58]

SAME—PROCEDURE ON HABEAS CORPUS

90. Section 754 of the Revised Statutes [59] requires that the application shall be made by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known; and that the facts set forth in the complaint shall be verified by the oath of the person making the application.

Requisites

This provision that it must be signed by the party for whose relief it is intended, and that he must make oath to it, seems to be directory only, and has not been rigidly en-

[56] 150 U. S. 637, 14 Sup. Ct. 225, 37 L. Ed. 1207. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45; "Courts," Cent. Dig. §§ 1376–1385.*

[57] In re Lincoln, 202 U. S. 178, 26 Sup. Ct. 602, 50 L. Ed. 984. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45; "Courts," Cent. Dig. §§ 1376–1385.*

[58] Whitney v. Dick, 202 U. S. 132, 26 Sup. Ct. 584, 50 L. Ed. 963. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 38–45; "Courts," Cent. Dig. §§ 1376–1385.*

[59] U. S. Comp. St. 1901, p. 593.

forced. In Re Neagle [60] it was neither signed nor sworn to by the applicant, but by some one in his behalf; and so, too, in Re Baez.[61]

The applicant must set out the facts clearly, and show wherein a federal question is involved. Mere general allegations of such are not sufficient, and there is an express requirement that the claim under which the applicant is detained must be set out, if known; which means that copies of the proceedings attacked must be set out, or their essential parts stated in the application.[62]

Rule to Show Cause

The court, instead of issuing the writ in the first instance, may, if it thinks proper, first issue a rule to show cause why the writ should not issue.[63]

Will Not Issue if Petition Shows Applicant Not Entitled Thereto

Under section 755 of the Revised Statutes [64] the court may issue the writ, unless it appears from the petition itself that the party is not entitled thereto. Under this clause of the statute it has been held that the writ will not issue when it appears upon the face of the petition that the prisoner is not entitled to it, or that it can serve no beneficial purpose to the applicant.

In Ex parte Terry [65] the application showed upon its face that the party had been committed for contempt, and

[60] 135 U. S. 1, 10 Sup. Ct. 658, 35 L. Ed. 55. *See "Habeas Corpus," Dec. Dig. (Key-No.) §§ 53, 57; Cent. Dig. §§ 50–54.*

[61] 177 U. S. 378, 20 Sup. Ct. 673, 44 L. Ed. 813. See, also, U. S. v. Watchorn (C. C.) 164 Fed. 152. *See "Habeas Corpus," Dec. Dig. (Key-No.) §§ 53–57; Cent. Dig. §§ 50–54.*

[62] Kohl v. Lehlback, 160 U. S. 293, 16 Sup. Ct. 304, 40 L. Ed. 432; Andersen v. Treat, 172 U. S. 24, 19 Sup. Ct. 67, 43 L. Ed. 351; Craemer v. Washington, 168 U. S. 124, 18 Sup. Ct. 1, 42 L. Ed. 407. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 54; Cent. Dig. § 51.*

[63] In re Lewis (C. C.) 114 Fed. 963. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 58.*

[64] U. S. Comp. St. 1901, p. 593.

[65] 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 92; Cent. Dig. §§ 87–96.*

that the court had authority to make the committal. So it was refused.

In Re Boardman [66] no federal question appeared upon the petition, and, as it was evident that the prisoner would be remanded if the writ issued, the court refused to issue it in the first instance.

In Re Baez [67] the applicant had been sentenced for illegally voting in Puerto Rico, but it appeared that his sentence had been for only thirty days, that most of it had expired when the writ was asked, and that the balance would expire before the court, in the nature of things, could consider the writ. Hence it was refused as involving a mere moot question.

The return is taken to be true until it is disproved,[68] and, where the writ is being used to attack collateral proceedings in another court, the applicant cannot contradict the record whose validity he is questioning.[69]

On the other hand, he can prove facts which do not contradict the record, as in Ex parte Cuddy,[70] where the procedure was for contempt on an attempt to bribe a juror. The record did not show where the attempt to bribe was made, and the court held that, for the purpose of considering the question, the party could prove this, as it did not contradict the record.[71]

[66] 169 U. S. 39, 18 Sup. Ct. 291, 42 L. Ed. 653. See, also, Erickson v. Hodges, 179 Fed. 177, 102 C. C. A. 443. *See "Habeas Corpus," Dec. Dig. (Key-No.) §§ 61, 92; Cent. Dig. §§ 55, 87–96.*

[67] 177 U. S. 378, 20 Sup. Ct. 673, 44 L. Ed. 813. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 5; Cent. Dig. § 5.*

[68] Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620; Stretton v. Rudy, 176 Fed. 727, 101 C. C. A. 223. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 79; Cent. Dig. § 70.*

[69] In re Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405. *See "Habeas Corpus," Dec. Dig. (Key-No.) § 79; Cent. Dig. § 70.*

[70] 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154. *See "Habeas Corpus," Dec. Dig. (Key-No.) §§ 92, 94; Cent. Dig. §§ 81–96.*

[71] Ex parte Mayfield, 141 U. S. 107, 11 Sup. Ct. 939, 35 L. Ed. 635. *See "Habeas Corpus," Dec. Dig. (Key-No.) §§ 92, 94; Cent. Dig. §§ 81–96.*

Testimony, however, can be taken when it does not contravene these well-settled rules.[72]

Where the prisoner is entitled to a writ, the court will not always discharge him unconditionally, but will frequently hold him until the proper authorities can be notified, so as to permit his rearrest in case the error complained of can be corrected.[73]

NE EXEAT

91. This writ may be issued by the district court or Supreme Court in their respective spheres to prevent the party proceeded against from leaving the United States in order to defeat the ends of justice.

Under section 717 of the Revised Statutes,[74] it is provided: "Writs of ne exeat may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any circuit court justice or circuit judge, in cases where they might be granted by the court of which he is a judge. But no writ of ne exeat shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States."

The abolition of the circuit court by the Judicial Code substitutes the district court in its stead.

[72] In re NEAGLE, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55; Storti v. Massachusetts, 183 U. S. 138, 22 Sup. Ct. 72, 46 L. Ed. 120. *See "Habeas Corpus," Dec. Dig. (Key-No.) §§ 92–96; Cent. Dig. §§ 81–96.*

[73] In re Medley, 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835; In re Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149. *See "Habeas Corpus," Dec. Dig. (Key-No.) §§ 109–111; Cent. Dig. §§ 97–100.*

[74] U. S. Comp. St. 1901, p. 580.

The bankrupt act also gives the district court jurisdiction to issue process of this nature against a bankrupt.[75]

Under section 716, giving the Supreme Court, circuit courts, and district courts power to issue writs necessary for the exercise of their respective jurisdictions, the district court may also issue it in connection with a case in that court.

Nor is the right to issue it limited to the progress of the case before final decree, but it may be issued after final decree, as a means of preventing a debtor from concealing his property and absconding.[76]

This writ, however, is not a matter of right, and the court, in its discretion, may refuse to issue it if the inconvenience to the defendant is great, and the plaintiff has equally convenient methods of protecting himself. For instance, where a citizen of New York applied to a United States court in Maine to issue it against a Canadian, who was merely there on a vacation, and who was easily suable in Quebec, in such case the judge refused to issue it.[77]

The usual condition of the bond taken from the defendant seized under this writ is that he will be amenable to the further orders and processes of the court issuing it, though it would not be improper to make the bond conditioned that he should perform the decree of the court.[78]

[75] In re Berkowitz (D. C.) 173 Fed. 1012. *See "Bankruptcy," Dec. Dig. (Key-No.) § 265; Cent. Dig. § 802; "Ne Exeat," Dec. Dig. (Key-No.) § 4; Cent. Dig. § 7.*

[76] Shainwald v. Lewis (D. C.) 46 Fed. 839. *See "Ne Exeat," Dec. Dig. (Key-No.) §§ 1, 3; Cent. Dig. §§ 1–6.*

[77] Harrison v. Graham (C. C.) 110 Fed. 896. *See "Ne Exeat," Dec. Dig. (Key-No.) §§ 1, 3; Cent. Dig. §§ 1–6.*

[78] Griswold v. Hazard, 141 U. S. 260, 11 Sup. Ct. 972, 35 L. Ed. 678. See, also, In re Appel, 163 Fed. 1002, 90 C. C. A. 172, 20 L. R. A. (N. S.) 76. *See "Ne Exeat," Dec. Dig. (Key-No.) § 8; Cent. Dig. § 10.*

CHAPTER XI

DISTRICT COURT (Continued)—ORIGINAL JURISDICTION OVER ORDINARY CONTROVERSIES

92. The Ordinary Civil Jurisdiction of the District Courts.
93. Same—Suits of a Civil Nature at Common Law or in Equity—Meaning of "Suit."
94. Same—Same—Suits at Law.
95. Same—Same—Suits in Equity.
96. Same—Suits by the United States or Any Officer Thereof.
97. Same—Controversies between Citizens of the Same State Claiming Lands under Grants of Different States.
98. Same—Jurisdictional Amount.
99. Same—Federal Questions.
100. Same—Controversies, between Citizens of Different States—Natural Persons.

THE ORDINARY CIVIL JURISDICTION OF THE DISTRICT COURTS

92. The ordinary original civil jurisdiction of the district court extends to cases in which the following requisites concur:

First. It must be a suit of a civil nature at common law or in equity.

Second. It must be either

(1) Brought by the United States or an officer thereof, or

(2) Be between citizens of the same State claiming lands under grants from different States, or

(3) Exceed three thousand dollars and

(a) Arise under the Constitution, laws or treaties of the United States, or

(b) Be between citizens of different States, or

(c) Be between citizens of a state and foreign states, citizens or subjects.

The branches of jurisdiction heretofore discussed have been of a special or exceptional nature. Until the Judicial Code of 1911, it had been the policy of Congress to confer on the district court cognizance of litigation of this sort, and to make the circuit court the forum for the ordinary controversies between man and man of which the federal courts could take jurisdiction. Therefore the previous discussion has been of those classes which went into the district court before the Judicial Code, either exclusively or concurrently with the circuit court. They were carried into the Judicial Code beginning with paragraph 2 of section 24. Paragraph 1 of that section sets out the general jurisdiction over controversies which heretofore went into the circuit court and which by the Judicial Code have been transferred bodily to the district court. Though substantially constant in its general scheme, it has been changed greatly in detail, but it is an evolution of the previous acts from the judiciary act of 1789 (1 Stat. 73, c. 20) to the present time. It is as follows:

"Sec. 24. The district courts shall have original jurisdiction as follows:

"First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same state claiming lands under grants from different states; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer

and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made: *Provided, however,* that the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section." [1]

The jurisdiction conferred by this section is far short of that which Congress can validly grant to the federal courts, being limited both as to the character of suit and as to the amount involved. An analysis of the section shows that, in order for federal jurisdiction to vest, the following requisites must concur: first, it must be a suit of a civil nature at common law or in equity; second, it must be either (1) brought by the United States or one of its officers, or (2) be between citizens of the same state claiming lands under grants from different states, or (3) exceed three thousand dollars exclusive of interest and costs, and (a) arise under the Constitution, laws or treaties of the United States, or (b) be between citizens of different States, or (c) be between citizens of a state and foreign states, citizens or subjects.

SAME—SUITS OF A CIVIL NATURE AT COMMON LAW OR IN EQUITY—MEANING OF "SUIT"

93. It is not every procedure which is a suit. The word is used in the sense of a proceeding in a court of common law or equity which culminates in a judgment that conclusively determines a right or obligation of the parties, so that the same matter cannot be further litigated except by writ of error or appeal.[2]

[1] 36 Stat. 1091 (U. S. Comp. St. Supp. 1911, p. 135).

[2] In re Stutsman Co. (C. C.) 88 Fed. 337. *See "Action," Dec. Dig. (Key-No.) §§ 1, 16; Cent. Dig. §§ 1–7, 85–93; "Courts," Dec. Dig.*

Matters of mere administration or ex parte proceedings are not suits, in the sense of this statute. For instance, the federal courts have no probate jurisdiction for admitting or refusing the probate of wills, or for administering an estate by virtue thereof.[3]

By this it is meant that the federal courts have no probate jurisdiction as such. If, however, they have jurisdiction by virtue of the citizenship of the parties, and in some proceeding which is undoubtedly a common-law or equity proceeding, the fact that questions under a will are involved does not of itself defeat that jurisdiction.[4]

A proceeding before a tribunal charged with the special power of revising a tax assessment has also been held not to be a suit, within the sense of the federal statute. A leading case on this subject is Upshur County v. Rich,[5] which considered an appeal to a body called a county court in West Virginia. The court, however, reviewing the state statutes, held that this was not a court, in the proper sense of the term; that its duties were merely administrative, and not judicial; and that therefore the federal courts had no jurisdiction over such a proceeding. On the other hand, in Re Stutsman County[6] District Judge Amidon held

(Key-No.) § 281; "Removal of Causes," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 11–20.

[3] UPSHUR COUNTY v. RICH, 135 U. S. 467, 10 Sup. Ct. 651, 34 L. Ed. 196; O'Callaghan v. O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101. *See "Courts," Dec. Dig. (Key-No.) § 281; "Removal of Causes," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 11–20.*

[4] Waterman v. Canal-Louisiana Bank & Trust Co., 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80; McClellan v. Carland, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. Ed. 762; American Baptist Home Mission Soc. v. Stewart (C. C.) 192 Fed. 976. *See "Courts," Dec. Dig. (Key-No.) §§ 472, 475.*

[5] 135 U. S. 467, 10 Sup. Ct. 651, 34 L. Ed. 196. See, also, PACIFIC STEAM WHALING CO. v. U. S., 187 U. S. 447, 23 Sup. Ct. 154, 47 L. Ed. 253. *See "Courts," Dec. Dig. (Key-No.) § 281; "Removal of Causes," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 11–20.*

[6] (C. C.) 88 Fed. 337. *See "Courts," Dec. Dig. (Key-No.) § 281; "Removal of Causes," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 11–20.*

that as the state statute in that case made the decision of the court conclusive and binding, and settled the obligation of the tax bill without any remedy except by appeal, it was a suit, in the sense of the statute.

Under the same principle, a proceeding for condemnation of lands may or may not be a suit, according to its nature. In so far as the proceeding is merely before a board of inquest, it is not a suit; but if the procedure is in a court, and unites the other requisites of jurisdiction, it may be one of which the federal court could take jurisdiction.[7]

A mandamus proceeding, on the other hand, is not a suit, in this sense, because mandamus in the federal courts is not an original writ, but rather in the nature of a writ of execution.[8]

On the other hand, a statutory civil action under a state law against a corporation for the forfeiture of its charter, which is the practical equivalent of a quo warranto proceeding, is such a suit.[9]

So, too, a writ of prohibition would come within this term.[10]

[7] Mississippi & Rum River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; In re Delafield (C. C.) 109 Fed. 577; Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462; Drainage Dist. No. 19, Caldwell County, v. Chicago, M. & St. P. R. Co. (D. C.) 198 Fed. 253 (a drainage case). It has already appeared that express jurisdiction over federal condemnations is vested in the district court (ante, p. 198). The above cases were state condemnation proceedings, in which the question of the right to remove was involved. *See "Courts," Dec. Dig. (Key-No.) § 281; "Removal of Causes," Dec. Dig. (Key-No.) §§ 4, 9; Cent. Dig. §§ 11–20.*

[8] Davenport v. Dodge County, 105 U. S. 237, 26 L. Ed. 1018; Rosenbaum v. Bauer, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743. *See "Courts," Dec. Dig. (Key-No.) § 281; "Removal of Causes," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 11–20.*

[9] Ames v. Kansas, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482. *See "Courts," Dec. Dig. (Key-No.) § 281; "Removal of Causes," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 11–20.*

[10] Weston v. Charleston, 2 Pet. 449, 7 L. Ed. 481. *See "Courts," Dec. Dig. (Key-No.) § 281; "Removal of Causes," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 11–20.*

A habeas corpus proceeding would also be included within the term.[11]

SAME—SAME—SUITS AT LAW

94. By a suit at law is not meant simply a suit authorized by the proceedings of the common law as distinguished from statutory proceedings, but it means a suit administering a legal right or title as distinguished from proceedings in equity or in admiralty.[12]

SAME—SAME—SUITS IN EQUITY

95. A suit in equity means a suit within the jurisdiction of an equitable court, as that jurisdiction existed at the time when the Constitution went into effect. This was practically the jurisdiction of the old high court of chancery in England, and while the principle is well established in the federal courts that equity has no jurisdiction if there is an adequate remedy at law, it is equally well established that state legislation can, in a general sense, neither enlarge nor restrict the jurisdiction of the federal courts in equity; and hence the fact that there may be now an adequate remedy at law by virtue of a state statute does not defeat the juris-

[11] Holmes v. Jennison, 14 Pet. 540, 614, 10 L. Ed. 579, 618. *See "Courts," Dec. Dig. (Key-No.) § 281; "Removal of Causes," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 11–20.*

[12] Fenn v. Holme, 21 How. 481, 16 L. Ed. 198; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449; Ellis v. Davis, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006. *See "Courts," Dec. Dig. (Key-No.) § 281; "Removal of Causes," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 11–20.*

diction of the federal equity court if the case is of a character in which it would have had jurisdiction in 1789.[13]

This principle that a state cannot enlarge the jurisdiction of the federal equity courts is a very important one. It can hardly be considered to go so far as to say that no additional state remedy in equity can be adopted by the federal courts, but it is clear that such additional remedies cannot be adopted if they would violate other provisions of the federal Constitution—notably, the provision that the right of jury trial shall be preserved. An analysis of the cases to be quoted shows that this is the point on which practically all of them turn. A new remedy in equity given by the state court as to cases in which the party would not have been entitled to a jury trial at common law could be adopted by the federal courts.[14]

As an illustration of the principle that a state statute cannot substitute an equitable procedure for one which at common law would have been before a jury, Whitehead v. Shattuck[15] was a case in which the state statute gave a party who was out of possession a statutory right to proceed in equity to settle the title to real estate. The Supreme Court held that the federal court would have no jurisdiction over it. So, too, where a state statute gave a simple-contract creditor the right to file a bill in equity to

[13] McCONIHAY v. WRIGHT, 121 U. S. 201, 7 Sup. Ct. 940, 30 L. Ed. 932; Arrowsmith v. Gleason, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630; Green v. Turner (C. C.) 98 Fed. 756; Waterman v. Canal-Louisiana Bank & Trust Co., 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80; ante, p. 10; post, p. 419. *See "Courts," Dec. Dig. (Key-No.) §§ 262, 335; "Removal of Causes," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 11–20.*

[14] National Surety Co. v. State Bank, 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394. *See "Courts," Dec. Dig. (Key-No.) § 262; Cent. Dig. §§ 797, 798.*

[15] 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873. *See "Courts," Dec. Dig. (Key-No.) § 335; Cent. Dig. §§ 902–907½.*

set aside a conveyance alleged to be fraudulent, though it gave him a lien from the date of filing his bill, it was held that the federal courts had no jurisdiction, and that it was necessary to proceed to judgment on the claim at common law before such a creditor could file a bill, or at least to have some lien or charge which was enforceable under the general principles of equity jurisprudence.[16]

As state legislation modifying or rearranging the original jurisdiction of common law or equity as between its own courts cannot operate to enlarge the equity jurisdiction of the federal courts as conferred by the Constitution, so neither can such legislation curtail it.[17]

SAME—SUITS BY THE UNITED STATES OR ANY OFFICER THEREOF

96. The district court has cognizance of all suits of a civil nature, at common law or in equity brought by the United States, or by any officer thereof authorized by law to sue.

This is the first class of suits named in paragraph 1, § 24, of the Judicial Code. The jurisdiction vests regardless of the amount involved, the committee of revision having adopted in this respect the construction placed upon the former acts by the Supreme Court.[18]

An action of debt for penalties in the name of the United States is sustainable under this paragraph, as well as under

[16] SCOTT v. NEELY, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 977, 37 L. Ed. 804; Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. *See "Courts," Dec. Dig. (Key-No.) §§ 259, 335; Cent. Dig. §§ 902–907½.*

[17] Western Union Tel. Co. v. Trapp, 186 Fed. 114, 108 C. C. A. 226. *See "Courts," Dec. Dig. (Key-No.) §§ 259, 335; Cent. Dig. §§ 795, 796, 902–907½.*

[18] U. S. v. SAYWARD, 160 U. S. 493, 16 Sup. Ct. 371, 40 L. Ed. 508. *See "Courts," Dec. Dig. (Key-No.) §§ 296, 326; Cent. Dig. § 838.*

the ninth.[19] So, also, an action on a postmaster's bond.[20] So, also, an action of trover by a United States marshal for money held by him in that capacity.[21] Suits by receivers of national banks, to realize the assets of the bank and for other purposes, are also sustainable under this section.[22] Also suits on contractors' bonds for the benefit of materialmen.[23]

SAME—CONTROVERSIES BETWEEN CITIZENS OF THE SAME STATE CLAIMING LANDS UNDER GRANTS OF DIFFERENT STATES

97. The district court has jurisdiction of cases involving controversies between citizens of the same state claiming lands under grants of different states.

The reason for conferring most classes of jurisdiction upon the federal courts is to protect those whose rights depend upon federal statutes, or who are nonresidents, from local influences and prejudices. Hence it is as important to confer this jurisdiction where the source of title might create prejudice, as where friends of the local tribunal or juries are opposed to strangers.

[19] Jacob v. U. S., Fed. Cas. No. 7,157; Hepner v. U. S., 213 U. S. 103, 29 Sup. Ct. 474, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739, 16 Ann. Cas. 960. *See "Courts," Dec. Dig. (Key-No.) § 296; Cent. Dig. § 838.*

[20] Postmaster General v. Early, 12 Wheat. 136, 6 L. Ed. 577. *See "Courts," Dec. Dig. (Key-No.) § 296; Cent. Dig. § 838.*

[21] Henry v. Sowles (D. C.) 28 Fed. 481. *See "Courts," Dec. Dig. (Key-No.) § 296; Cent. Dig. § 838.*

[22] Frelinghuysen v. Baldwin (D. C.) 12 Fed. 395; Lake Nat. Bank v. Wolfeborough Sav. Bank, 78 Fed. 517, 24 C. C. A. 195; Schofield v. Palmer (C. C.) 134 Fed. 753; Auten v. United States Nat. Bank, 174 U. S. 125, 19 Sup. Ct. 628, 43 L. Ed. 920. *See "Courts," Dec. Dig. (Key-No.) § 296; Cent. Dig. § 838.*

[23] United States Fidelity & Guaranty Co. v. U. S., 204 U. S. 349, 27 Sup. Ct. 381, 51 L. Ed. 516. *See "Courts," Dec. Dig. (Key-No.) § 296; Cent. Dig. § 838.*

At the time of the adoption of the Constitution, conflicting land grants among the several states were quite common. The relative boundaries of the states in relation to each other were not well settled, and when new states were formed there were often difficulties as to whether the grant from the old state or the grant from the new state was a valid one. It was soon decided that the federal courts had jurisdiction in cases of conflicting grants between an old and a new state, although the grant of the old state was made before the new state was formed. This was decided in the case of conflicting grants from New Hampshire and Vermont, where the New Hampshire grant was made at a time when Vermont was still a part of New Hampshire.[24] This source of litigation, however, has long since lost its importance.

SAME—JURISDICTIONAL AMOUNT

98. "The matter in controversy must exceed, exclusive of interest and costs, the sum or value of $3,000." The "matter in controversy," in the sense in which it is used as defining the pecuniary jurisdiction of the federal courts, means the claim presented on the record to the consideration of the court, though, as a matter of fact, the claim is not sustained by the proof, or though it is only in part well founded. It is the pecuniary consequences to the party which are dependent on the litigation.[25]

This means the amount or value directly at issue between the parties in the special suit. The collateral effect

[24] Pawlet v. Clark, 9 Cranch, 292, 3 L. Ed. 735. *See "Courts," Dec. Dig. (Key-No.) § 320; Cent. Dig. § 846.*

[25] Kanouse v. Martin, 15 How. 198, 14 L. Ed. 660; Schunk v. Moline, Milburn & Stoddard Co., 147 U. S. 500, 13 Sup. Ct. 416, 37 L. Ed. 255; WHELESS v. ST. LOUIS, 180 U. S. 379, 21 Sup. Ct. 402, 45 L. Ed. 583. *See "Courts," Dec. Dig. (Key-No.) § 328; Cent. Dig. §§ 890–896.*

of that suit cannot be considered. For instance, where suit is brought upon coupons detached from bonds whose amounts were less than $2,000, and the issue raised involved not merely the validity of the coupons, but the validity of the bonds themselves, this fact did not give jurisdiction.[26]

The former statutes as to the jurisdiction of the federal courts prescribed a lesser amount than the present limit of $3,000, and did not exclude interest from the computation. Hence decisions passing upon the amount then required are in point as to the general principle, though this difference between them must be borne in mind.

Prior to the establishment of the circuit courts of appeals, the limit to the jurisdiction of the United States Supreme Court was for a long time $2,000, and then $5,000. The statutes defining this limit used the same language as the statutes regulating the jurisdiction of the lower court as to amount, except that interest was not excluded from the calculation. Hence decisions on the statutes limiting the jurisdiction of the Supreme Court are also in point, and many of those referred to under this title relate to the jurisdiction of the Supreme Court under the former law.

The claim asserted by the plaintiff, in order to give jurisdiction, must be actually asserted in good faith, and not colorable merely. If, for instance, coupons or other evidences of indebtedness are transferred to a prospective plaintiff without consideration, and merely for the purpose of collection, the court will not acquire jurisdiction. Not only this, but under another section of the statute it is the duty of the court, of its own motion, even without a plea, to dismiss the case for want of jurisdiction on discovering that the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the court,

[26] Bruce v. Manchester & K. R. Co., 117 U. S. 514, 6 Sup. Ct. 849, 29 L. Ed. 990. *See "Courts," Dec. Dig. (Key-No.) § 328; Cent. Dig. §§ 890–896.*

or that the parties to the suit have been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case cognizable by the federal courts.[27]

In considering whether the case involves a sufficient amount to give the court jurisdiction, reference will be made, not to the ad damnum clause alone, but to the whole declaration. For instance, where replevin was brought for liquors alleged to be worth $1,000, and the item of special damage to complainant's business was added, but it was apparent from the face of the declaration itself that the item was not recoverable, the court refused to sustain jurisdiction, though the ad damnum clause was large enough, considered alone, to give it.[28]

So, too, where the ad damnum clause was high enough, but one item of damage was claimed, which, on the face of the declaration, appeared to be illegal or not recoverable or provable in evidence, the court held that the jurisdiction did not attach.[29]

On the other hand, in suits where there is no fixed measure of damages prescribed by law, as in suits for malicious torts or trespass, the court is practically compelled to go by the ad damnum clause, for the question of the amount of damages in such case is for the jury; and the court cannot say, as matter of law, that the ad damnum clause is laid too high, though it might think that a recovery would not exceed the statutory requirement.[30]

[27] Waite v. Santa Cruz, 184 U. S. 302, 22 Sup. Ct. 327, 46 L. Ed. 552; Woodside v. Beckham, 216 U. S. 117, 30 Sup. Ct. 367, 54 L. Ed. 408. *See "Courts," Dec. Dig. (Key-No.) § 328; Cent. Dig. §§ 890–896.*

[28] Vance v. Vandercook Co., 170 U. S. 468, 18 Sup. Ct. 645, 42 L. Ed. 1111; Smithers v. Smith, 204 U. S. 632, 27 Sup. Ct. 297, 51 L. Ed. 656. *See "Courts," Dec. Dig. (Key-No.) § 329; Cent. Dig. § 897.*

[29] North American Transportation & Trading Co. v. Morrison, 178 U. S. 262, 20 Sup. Ct. 869, 44 L. Ed. 1061. *See "Courts," Dec. Dig. (Key-No.) § 329; Cent. Dig. § 897.*

[30] Scott v. Donald, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632;

As the measure is the plaintiff's claim, and not the amount actually due him, the final result is no test; and therefore the fact that the defendant admits the claim or that recovery is for less than the jurisdictional amount is immaterial. If this were not so, every verdict for a defendant in the federal court would conclusively establish the lack of jurisdiction of the court.[31]

Where the defendant sets up a counterclaim and asks for a cross-recovery, so that the question at issue is not simply the amount claimed by the plaintiff, but also the amount claimed by the defendant, the aggregate of the two amounts is the matter in dispute.[32]

So, too, where a counterclaim is set up as a defense merely in reduction of the plaintiff's claim, it does not defeat the jurisdiction, if the plaintiff's claim before any pleading was put in was sufficient in amount.[33]

Where the plaintiff sues for an amount, part whereof is barred by the statute of limitations, and this is apparent upon the petition, the court still has jurisdiction, for the statute of limitations is a personal plea, and the court cannot know judicially that the defendant will interpose it.[34]

Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84. *See "Courts," Dec. Dig. (Key-No.) § 329; Cent. Dig. § 897.*

[31] Scott v. Donald, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632; O. J. Lewis Mercantile Co. v. Klepner, 176 Fed. 343, 100 C. C. A. 285; In re Reisenberg, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403. This case discusses the meaning of the word "controversy" and decides that it does not necessarily mean a contest. It was probably due to this decision that the revision committee substituted the words "matter in controversy" in the Judicial Code for "matter in dispute" in the previous statute. *See "Courts," Dec. Dig. (Key-No.) § 328; Cent. Dig. §§ 890–896.*

[32] Block v. Darling, 140 U. S. 234, 11 Sup. Ct. 832, 35 L. Ed. 476. A defendant who sēts up a counterclaim becomes an actor and cannot deny the jurisdiction. Merchants' Heat & Light Co. v. James B. Clow & Sons, 204 U. S. 286, 27 Sup. Ct. 285, 51 L. Ed. 488. *See "Courts," Dec. Dig. (Key-No.) § 328; Cent. Dig. §§ 890–896.*

[33] Pickham v. Wheeler-Bliss Mfg. Co., 77 Fed. 663, 23 C. C. A. 391; Id., 168 U. S. 708, 18 Sup. Ct. 945, 42 L. Ed. 1211. *See "Courts," Dec. Dig. (Key-No.) § 328; Cent. Dig. §§ 890–896.*

[34] Board of Com'rs of Kearney Co. v. Vandriss, 115 Fed. 866, 53

The present act excludes interest from the computation in considering the jurisdiction of the district court. This, however, means interest as such. Where suit is brought for a cause of action into which a calculation of interest enters merely as an item of damage, this does not defeat the jurisdiction. For instance, in a suit for damages for a breach of warranty, where under the state statute the measure of damages was the cost of the property, with interest, the court had jurisdiction, though the cost, independent of interest, would not have given it.[35]

So, too, suits on matured coupons can take the coupons into account as well as the bonds, for detached and matured coupons are separate demands bearing interest themselves, and are not mere incidents of the present debt.[36]

In suits for different penalties arising out of alleged violations of a statute, the amount in controversy is the aggregate of the different penalties claimed; and the court may consolidate different actions for such penalties.[37]

In order for the federal district court to have jurisdiction under this clause, the subject-matter in dispute must be capable of pecuniary estimation; hence, although a proceeding by habeas corpus is a suit at law or equity, as above explained, the district court would not have jurisdiction of it by virtue of this statute, for the reason that no mone-

C. C. A. 192; Id., 187 U. S. 642, 23 Sup. Ct. 843, 47 L. Ed. 346; Schunk v. Moline, Milburn & Stoddard Co., 147 U. S. 500, 13 Sup. Ct. 416, 37 L. Ed. 255. *See "Courts," Dec. Dig. (Key-No.) § 328; Cent. Dig. §§ 890–896.*

[35] Brown v. Webster, 156 U. S. 328, 15 Sup. Ct. 377, 39 L. Ed. 440; Continental Casualty Co. v. Spradlin, 170 Fed. 322, 95 C. C. A. 112. *See "Courts," Dec. Dig. (Key-No.) § 328; Cent. Dig. §§ 890–896.*

[36] EDWARDS v. BATES CO., 163 U. S. 269, 16 Sup. Ct. 967, 41 L. Ed. 155. *See "Courts," Dec. Dig. (Key-No.) § 328; Cent. Dig. §§ 890–896.*

[37] Baltimore & O. S. R. Co. v. U. S., 220 U. S. 94, 31 Sup. Ct. 368, 55 L. Ed. 384. *See "Courts," Dec. Dig. (Key-No.) § 328; Cent. Dig. §§ 890–896.*

tary amount is involved in it. The custody of a child, for instance, "rises superior to money considerations." [38]

This merely means that a federal district court has no jurisdiction of such a procedure by virtue of this special statute. It is given jurisdiction of habeas corpus proceedings by virtue of other statutes which have been already discussed.

In considering the matter in dispute, the damages suffered are not always the test. For instance, in a suit to have a bridge removed, as a nuisance, the matter in dispute is not merely the damage caused to the plaintiff, but the value of the structure to be removed.[39]

So, in a procedure by injunction, the test of jurisdiction is the value of the right to be protected or the injury to be prevented.[40]

In a proceeding by a creditor to set aside an alleged fraudulent transfer of property, the jurisdiction is determined by the amount for which the creditor sues, not by the value of the property, for the defendant, by paying that amount, would be discharged from all obligation.[41]

So, in a suit to restrain an alleged illegal issue of bonds on the ground that the plaintiff's taxes will be materially increased, the jurisdiction is determined by the amount of

[38] Barry v. Mercein, 5 How. 103, 12 L. Ed. 70; Kurtz v. Moffitt, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458. *See "Courts," Dec. Dig. (Key-No.) § 326; Cent. Dig. § 888.*

[39] Mississippi & M. Ry. Co. v. Ward, 2 Black, 485, 17 L. Ed. 311; Rainey v. Herbert, 55 Fed. 443, 5 C. C. A. 183; American Smelting & Refining Co. v. Godfrey, 158 Fed. 225, 89 C. C. A. 139, 14 Ann. Cas. 8. *See "Courts," Dec. Dig. (Key-No.) § 328; Cent. Dig. §§ 890–896.*

[40] Nashville, C. & St. L. Ry. Co. v. McConnell (C. C.) 82 Fed. 65; Southern Pac. Co. v. Bartine (C. C.) 170 Fed. 725; Larabee v. Dolley (C. C.) 175 Fed. 365. *See "Courts," Dec. Dig. (Key-No.) § 328; Cent. Dig. §§ 890–896.*

[41] Werner v. Murphy (C. C.) 60 Fed. 769; Alkire Grocery Co. v. Richesin (C. C.) 91 Fed. 79. *See "Courts," Dec. Dig. (Key-No.) § 328; Cent. Dig. §§ 890–896.*

the taxes the plaintiff would have to pay, not by the value of the total bond issue.[42]

Plurality of Plaintiffs or Defendants

Where there is more than one plaintiff, if the interests of the plaintiffs are joint, and not several, the entire amount will be taken into consideration in determining the jurisdiction; but if their interests are several, and they have merely joined for convenience in bringing the suit, then the amounts due to the different plaintiffs cannot be joined for the purpose of conferring jurisdiction.

This is the general rule, though sometimes it may be difficult to draw the exact line.[43] For instance, in New Orleans Pac. Ry. Co. v. Parker,[44] a bondholder brought suit on behalf of all the bondholders under a mortgage, and actually represented more than two hundred bonds, and the mortgage permitted suit by any bondholder. The court held in such case that all the bonds could be considered for the purpose of conferring jurisdiction, as all the bonds claimed under the common source of title; that is, the mortgage.

On the other hand, in Wheless v. St. Louis [45] several parties owning separate lots brought a suit attacking an assessment against them for improving a street. The court

[42] Colvin v. Jacksonville, 158 U. S. 456, 15 Sup. Ct. 866, 39 L. Ed. 1053; Linehan Ry. Transfer Co. v. Pendergrass, 70 Fed. 1, 16 C. C. A. 585. But a claim of contract exemption from taxation is not limited in value by the amount of the particular tax assessed at the time. Berryman v. Board of Trustees of Whitman College, 222 U. S. 334, 32 Sup. Ct. 147, 56 L. Ed. 225. *See "Courts," Dec. Dig. (Key-No.) § 328; Cent. Dig. §§ 890–896.*

[43] Rainey v. Herbert, 55 Fed. 443, 5 C. C. A. 183; Green Co. v. Thomas, 211 U. S. 598, 29 Sup. Ct. 168, 53 L. Ed. 343; McDaniel v. Traylor, 212 U. S. 428, 29 Sup. Ct. 343, 53 L. Ed. 584; Troy Bank v. G. A. Whitehead & Co., 222 U. S. 39, 32 Sup. Ct. 9, 56 L. Ed. 81. *See "Courts," Dec. Dig. (Key-No.) § 328; Cent. Dig. §§ 890–896.*

[44] 143 U. S. 42, 12 Sup. Ct. 364, 36 L. Ed. 66. *See "Courts," Dec. Dig. (Key-No.) § 328; Cent. Dig. §§ 890–896.*

[45] 180 U. S. 379, 21 Sup. Ct. 402, 45 L. Ed. 583. *See "Courts," Dec. Dig. (Key-No.) § 328; Cent. Dig. §§ 890–896.*

held in such case that their interests were several, and could not be joined for the purpose of jurisdiction.

This same principle applies as to joining the defendants. Where the claims against the separate defendants are several, they cannot be joined for the purpose of conferring jurisdiction. For instance, suits against different county officers, combining them as defendants, to enjoin the collection of a tax separately assessed in their different counties, were several, and the claims against these different defendants could not be joined for the purpose of conferring jurisdiction.[46]

This principle, however, does not prevent parties from filing petitions for amounts under the jurisdictional amount where a suit involving the proper amount has already been brought, and the court has thereby acquired jurisdiction. If, in administering a fund, the court has acquired jurisdiction at the suit of one who had a sufficient amount to give it, petitions filed by others to share in the result of the suit are merely incidental, and can be considered by the court, though they could not originally have combined for the purpose of giving jurisdiction.[47]

The fact that the requisite amount is involved must appear from the allegations of fact in the declaration. A mere general allegation that the sum of $3,000 is involved amounts to nothing more than a conclusion of law, and is not sufficient, unless the other parts of the declaration bear it out.[48]

[46] Walter v. Northeastern Ry. Co., 147 U. S. 370, 13 Sup. Ct. 348, 37 L. Ed. 206; FISHBACK v. WESTERN UNION TEL. CO., 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630; Citizens' Bank v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451. *See "Courts," Dec. Dig. (Key-No.) § 328; Cent. Dig. §§ 890–896.*

[47] Handley v. Stutz, 137 U. S. 366, 11 Sup. Ct. 117, 34 L. Ed. 706; National Bank of Commerce v. Allen, 90 Fed. 545, 33 C. C. A. 169; Alsop v. Conway, 188 Fed. 568, 110 C. C. A. 366; Robertson v. Conway, 188 Fed. 579, 110 C. C. A. 377. *See "Courts," Dec. Dig. (Key-No.) § 328; Cent. Dig. §§ 890–896.*

[48] FISHBACK v. WESTERN UNION TEL. CO., 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630. *See "Courts," Dec. Dig. (Key-No.) § 329; Cent. Dig. § 897.*

It is important to bear in mind that the limitation as to amount applies only to the first paragraph of section 24 of the Judicial Code, the succeeding paragraphs being expressly excepted from its operation. Even as to the first paragraph, it does not apply to suits by the United States or any officer thereof, nor to suits by citizens of the same state claiming lands under grants from different states.

SAME—FEDERAL QUESTIONS

99. If the procedure is a suit as just explained and involves over $3,000, the jurisdiction extends to cases arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority. This class is commonly called federal questions, and a federal question is involved not merely when the construction of a federal statute incidentally arises, but when the case necessarily turns upon the construction of the federal laws, as when the plaintiff would be defeated by one construction, or successful by another.

In the class under discussion, it is not sufficient that the suit must be at law or in equity, and must involve $3,000. In addition, one of several other conditions must concur: Either (1) the case must arise under the Constitution or laws of the United States, or treaties made or which shall be made under their authority; or (2) it must be a controversy between citizens of different states; or (3) it must be a controversy between citizens of a state and foreign states, citizens or subjects. These requisites must now be considered in their order.

Cases Arising under the Constitution or Laws of the United States, or Treaties Made or Which shall be made under Their Authority

If the case is of this nature, the district court has jurisdiction independent of any question of citizenship. The

two great branches of jurisdiction of the court in ordinary controversies are, first, cases depending upon the nature of the controversy—that is, involving a federal question, as this branch is usually designated; and, second, cases depending upon the citizenship of the parties.

In another connection (the question of appeals from the state courts to the Supreme Court) it will be found that this term "federal question" is used in a rather more restricted sense than in the sense in which it is used as defining the jurisdiction of the federal district courts. In the latter class, a case involves a federal question when its correct decision depends upon the construction of the federal Constitution or statutes, or when the plaintiff would be defeated by one construction or sustained by another.[49]

Pleadings must Show Federal Question

In order for this ground of jurisdiction to exist, a mere general allegation that the plaintiff's case rests upon a construction of the federal Constitution or statutes is not sufficient. The facts in his pleading must show this. And it must also appear that the plaintiff's own case necessarily depends upon the construction of the federal Constitution or statutes. If it is not part of the plaintiff's case, he cannot give jurisdiction by anticipating in his pleading the defense which he expects the defendant to make, and stating that such defense turns upon a federal question.[50]

[49] LITTLE YORK GOLD WASHING & WATER CO. v. KEYES, 96 U. S. 199, 24 L. Ed. 656; Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648; post, pp. 497, 505. *See "Courts," Dec. Dig. (Key-No.) § 284; Cent. Dig. §§ 820–839.*

[50] FLORIDA C. & P. R. CO. v. BELL, 176 U. S. 321, 20 Sup. Ct. 399, 44 L. Ed. 486; Western Union Tel. Co. v. Ann Arbor R. Co., 178 U. S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052; Arkansas v. Kansas & T. Coal Co., 183 U. S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144; Defiance Water Co. v. Defiance, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140; Devine v. Los Angeles, 202 U. S. 313, 26 Sup. Ct. 652, 50 L. Ed. 1046; Louisville & N. R. Co. v. Mottley, 211 U. S. 149, 29 Sup. Ct. 42, 53 L. Ed. 126; Earnhart v. Switzler, 179 Fed. 832, 105 C. C. A. 260. *See "Courts," Dec. Dig. (Key-No.) § 299; Cent. Dig. § 841.*

If, however, it does appear from the plaintiff's pleading that a federal question is involved, the jurisdiction of the court is not defeated by the fact that other nonfederal questions may also be involved.[51]

The jurisdiction depends upon the plaintiff's allegations, not upon the construction which the defendant gives them.[52]

As a general rule, the jurisdiction is dependent upon the plaintiff's own statement; but if the plaintiff puts in a federal question which has not even a color of merit, or if he raises a federal question, and the defendant by his answer admits his construction of it, the court may dismiss the suit of its own motion under another section of the act, which permits it to do so whenever it appears that a case giving the federal courts jurisdiction is not necessarily involved.[53]

Some concrete instances of suits involving federal questions may make this clear, bearing in mind that the plaintiff's pleading must show the necessary jurisdictional facts. A suit against a corporation organized under an act of Congress necessarily involves a federal question, and can be brought in the federal courts, if the other requisites of jurisdiction concur.[54]

[51] New Orleans, M. & T. R. Co. v. Mississippi, 102 U. S. 135, 26 L. Ed. 96; St. Paul, M. & M. R. Co. v. St. Paul & N. P. R. Co., 68 Fed. 2, 15 C. C. A. 167; St. Paul & N. P. R. Co. v. St. Paul, M. & M. R. Co., 18 Sup. Ct. 946, 42 L. Ed. 1212; San Francisco Gas & Electric Co. v. San Francisco (C. C.) 189 Fed. 943. *See "Courts," Dec. Dig. (Key-No.) §§ 282, 284; Cent. Dig. §§ 820–839.*

[52] Central Ry. Co. of New Jersey v. Mills, 113 U. S. 249, 5 Sup. Ct. 456, 28 L. Ed. 949. *See "Courts," Dec. Dig. (Key-No.) § 299; Cent. Dig. § 841.*

[53] McCain v. Des Moines, 174 U. S. 168, 19 Sup. Ct. 644, 43 L. Ed. 936; Excelsior Wooden Pipe Co. v. Bridge Co., 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910. *See "Courts," Dec. Dig. (Key-No.) §§ 282, 284; Cent. Dig. §§ 820–839.*

[54] Union Pac. R. Co. v. Harris, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. Ed. 1003; Texas & P. R. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; A. L. Wolff & Co. v. Choctaw, O. & G. R. Co. (C. C.) 133 Fed. 601. *See "Courts," Dec. Dig. (Key-No.) § 293; Cent. Dig. § 835.*

So a suit on the bond of a United States marshal for an illegal seizure of goods under a writ of the United States court involves a federal question.[55]

So, too, a suit on a clerk's bond, brought by a private suitor, which raises the question whether the sureties on the bond were liable for money paid into court on a tender, involves a federal question.[56] So a suit by a materialman against the sureties on a government contractor's bond.[57]

A suit to determine the validity of the consolidation of two railway companies, authorized by act of Congress, involves a federal question.[58]

Suits to restrain the collection of taxes alleged to violate the constitutional provision as to due process of law are quite frequent in the federal courts. If they turn upon the question whether the state law under which the tax is assessed is a violation of the federal Constitution, they involve a federal question. If it is a mere question whether they involve a conflict of a state law with the state Constitution, they do not involve a federal question.[59]

The same principle applies to suits under the due process clause.[60]

[55] Bock v. Perkins, 139 U. S. 628, 11 Sup. Ct. 677, 35 L. Ed. 314; Frank v. Leopold & Feron Co. (C. C.) 169 Fed. 922. *See "Courts," Dec. Dig. (Key-No.) § 296; Cent. Dig. § 838.*

[56] Howard v. U. S., 184 U. S. 676, 22 Sup. Ct. 543, 46 L. Ed. 754. *See "Courts," Dec. Dig. (Key-No.) § 296; Cent. Dig. § 838.*

[57] Act Aug. 13, 1894, 28 Stat. 278, c. 280 (U. S. Comp. St. 1901, p. 2523); Mullin v. U. S., 109 Fed. 817, 48 C. C. A. 677. Compare Henningsen v. United States Fidelity & Guaranty Co., 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547; United States Fidelity & Guaranty Co. v. U. S., 204 U. S. 349, 27 Sup. Ct. 381, 51 L. Ed. 516. *See "Courts," Dec. Dig. (Key-No.) § 296; Cent. Dig. § 838.*

[58] Ames v. Kansas, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482. *See "Courts," Dec. Dig. (Key-No.) § 293; Cent. Dig. § 835.*

[59] Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443; Wheeler v. New York, N. H. & H. R. Co., 178 U. S. 321, 20 Sup. Ct. 949, 44 L. Ed. 1085; McCain v. Des Moines, 174 U. S. 168, 19 Sup. Ct. 644, 43 L. Ed. 936; West v. Louisiana, 194 U. S. 258, 24 Sup. Ct. 650, 48 L. Ed. 965. *See "Courts," Dec. Dig. (Key-No.) §§ 282, 297; Cent. Dig. §§ 820–824, 839.*

[60] San Francisco Gas & Electric Co. v. San Francisco (C. C.) 189

In order for the federal court to have jurisdiction, it must not only involve a federal question, but it must be a suit of which the court can take jurisdiction. If, for instance, it is a suit to enjoin a tax, and of such a character that an equity court has no jurisdiction, then the federal equity court cannot take jurisdiction.[61]

A common character of controversy is that class in which state legislation is alleged to violate the obligation of contracts. This is undoubtedly a federal question. There are numerous illustrations of this class in cases which have gone to the Supreme Court, and cases involving the right of cities after having given one waterworks company or public service company the right to supply them with utilities, to give the same right to subsequent companies, or to undertake the supply themselves.[62]

Another instance is where it is claimed that subsequent legislation infringes an exemption from taxation conferred by a charter.[63]

The question what effect a federal judgment has as a lien by virtue of state or federal statutes, when such judgment is a necessary link in a chain of title, is a federal question.[64]

Fed. 943. *See "Courts," Dec. Dig. (Key-No.) § 282; Cent. Dig. §§ 820–824.*

[61] Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651. *See "Courts," Dec. Dig. (Key-No.) § 282; Cent. Dig. §§ 820–824.*

[62] Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 22 Sup. Ct. 585, 46 L. Ed. 808; City of Dawson v. Columbia Ave. Saving Fund, Safe Deposit, Title & Trust Co., 197 U. S. 178, 25 Sup. Ct. 420, 49 L. Ed. 713; American Telephone & Telegraph Co. of Alabama v. New Decatur (C. C.) 176 Fed. 133. *See "Courts," Dec. Dig. (Key-No.) § 282; Cent. Dig. §§ 820–824.*

[63] Illinois Cent. R. Co. v. Adams, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410; Jetton v. University of the South, 208 U. S. 489, 28 Sup. Ct. 375, 52 L. Ed. 584. *See "Courts," Dec. Dig. (Key-No.) § 282; Cent. Dig. §§ 820–824.*

[64] Cooke v. Avery, 147 U. S. 375, 13 Sup. Ct. 340, 37 L. Ed. 209. *See "Courts," Dec. Dig. (Key-No.) § 282; Cent. Dig. §§ 820–824.*

But the mere fact that suit is brought upon a judgment of a federal court does not make it a federal question.[65]

Many cases involving federal questions arise out of the federal control or influence over navigable waters. The question whether certain structures are obstructions to navigation in waters claimed to be so navigable as to fall under the jurisdiction of the United States, and the question as to the right to erect a dock claimed by virtue of an act of Congress, are federal questions.[66]

But not mere questions of conflicting riparian rights, though tracing back to federal patents.[67]

Suits based upon the interstate commerce act, or the commercial clause of the Constitution, involve federal questions.[68]

National Banks

It has been stated above that suits against corporations organized under acts of Congress per se involve federal questions. Independent of statute, this would be true as to suits against national banks, but Congress has seen fit to provide expressly that the federal courts should not have jurisdiction in suits against national banks under any other circumstances than such as they would have in cases against individual citizens of the same state.[69]

[65] Provident Sav. Life Assur. Soc. v. Ford, 114 U. S. 635, 5 Sup. Ct. 1104, 29 L. Ed. 261. Compare H. C. Cook Co. v. Beecher, 217 U. S. 497, 30 Sup. Ct. 601, 54 L. Ed. 855. *See "Courts," Dec. Dig. (Key-No.) §§ 282, 290; Cent. Dig. §§ 820–832.*

[66] U. S. v. Bellingham Bay Boom Co., 176 U. S. 211, 20 Sup. Ct. 343, 44 L. Ed. 437; Cummings v. Chicago, 188 U. S. 410, 23 Sup. Ct. 472, 47 L. Ed. 525; North Shore Boom & Driving Co. v. Nicomen Boom Co., 212 U. S. 406, 29 Sup. Ct. 355, 53 L. Ed. 574. *See "Courts," Dec. Dig. (Key-No.) § 288; Cent. Dig. § 830.*

[67] Devine v. Los Angeles, 202 U. S. 313, 26 Sup. Ct. 652, 50 L. Ed. 1046; McGilvra v. Ross, 215 U. S. 70, 30 Sup. Ct. 27, 54 L. Ed. 95. Also, as analogous, Donnelly v. U. S., 228 U. S. 243, 33 Sup. Ct. 449, 57 L. Ed. —. *See "Courts," Dec. Dig. (Key-No.) § 288; Cent. Dig. § 830.*

[68] In re Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110. *See "Courts," Dec. Dig. (Key-No.) § 289; Cent. Dig. § 830.*

[69] Judicial Code, § 24, par. 16; CONTINENTAL NAT. BANK v.

Under this, the mere fact that the suit is against a national bank does not give jurisdiction. But if the question raised in the suit is such as would constitute a federal question independent of the fact that the defendant is a national bank, the court would have jurisdiction. For instance, the question whether a national bank which had acquired stock in a state bank, and was sued as a stockholder, had a right to acquire such stock, or whether it was acquired in the regular course of business, constitutes a federal question, and gives jurisdiction.[70]

A suit for damages against directors of a national bank for making a false report, though in form an action of deceit, raises a federal question.[71]

On the other hand, where a stockholder of a national bank had sold his stock, and the purchaser had failed to transfer it, in consequence of which the vendor remained as a stockholder on the books of the bank, and was sued after the failure of the bank for his stock assessment, a suit by him against the purchaser for failing to transfer did not involve a federal question.[72]

A suit based on the refusal of election officers to receive a vote at a congressional election is essentially a suit arising under the federal Constitution, of which the court has jurisdiction, though it may subsequently decide that there is no merit in the contention.[73]

BUFORD, 191 U. S. 119, 24 Sup. Ct. 54, 48 L. Ed. 119; ante, p. 82. *See "Courts," Dec. Dig. (Key-No.) § 294; Cent. Dig. § 836; "Banks and Banking," Cent. Dig. §§ 1056, 1059.*

[70] California Nat. Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198. *See "Courts," Dec. Dig. (Key-No.) § 299; Cent. Dig. § 841.*

[71] Thomas v. Taylor, 224 U. S. 73, 32 Sup. Ct. 403, 56 L. Ed. 673. *See "Courts," Dec. Dig. (Key-No.) § 299; Cent. Dig. § 841.*

[72] Le Sassier v. Kennedy, 123 U. S. 521, 8 Sup. Ct. 244, 31 L. Ed. 262; In re Jones, 164 U. S. 691, 17 Sup. Ct. 222, 41 L. Ed. 601. *See "Courts," Dec. Dig. (Key-No.) § 294; Cent. Dig. § 836; "Banks and Banking," Cent. Dig. §§ 1056–1059.*

[73] Swafford v. Templeton, 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005. Compare this case with the case of Excelsior Wooden Pipe Co.

It is not enough, however, in order to confer a federal question, that some act of Congress or title claimed under the United States may be incidentally involved. The case must turn necessarily upon the construction of a federal question. This is illustrated by controversies arising out of patents and trade-marks. If the jurisdiction is invoked on the ground of an infringement, then a federal question is involved; but if, on the other hand, the controversy is simply over contracts arising out of grants of the right to sell patents, and turns upon the construction of these contracts between the parties, a federal question is not involved, though the subject of litigation is a patent, or trade-mark.[74]

Nor is a federal question involved simply from the fact that suit is brought against a receiver appointed by a federal court. The basis of the suit itself must involve a federal question, and the mere fact that a federal receiver is sued is not sufficient to give jurisdiction.[75]

Nor is it sufficient to constitute a federal question that

v. Pacific Bridge Co., 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910, in order to ascertain how far the jurisdiction of the court is defeated by the defendant's pleading. The true distinction appears to be that if the claim of the plaintiff is bona fide and appears clearly upon his bill, and that claim is not formally admitted by the pleadings, the court has jurisdiction, though the facts in the case, on the plaintiff's own proof, should show that his claim is not well founded. But if the claim as set up by him is formally admitted on the pleadings, then there is no controversy between the parties involving a federal question, and the court may consider this as showing a want of federal jurisdiction. *See "Courts," Dec. Dig. (Key-No.) §§ 281, 282; Cent. Dig. §§ 820–825.*

[74] Pratt v. Paris Gaslight & Coke Co., 168 U. S. 255, 18 Sup. Ct. 62, 42 L. Ed. 458; Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910; Baglin v. Cusenier Co., 221 U. S. 580, 31 Sup. Ct. 669, 55 L. Ed. 863; Henry v. A. B. Dick Co., 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645; The Fair v. Kohler Die & Specialty Co., 228 U. S. 22, 33 Sup. Ct. 410, 57 L. Ed. —; post, p. 490. *See "Courts," Dec. Dig. (Key-No.) §§ 290–292; Cent. Dig. §§ 832–834.*

[75] Bausman v. Dixon, 173 U. S. 113, 19 Sup. Ct. 316, 43 L. Ed. 632; Gableman v. Peoria, D. & E. R. Co., 179 U. S. 335, 21 Sup. Ct. 171, 45 L. Ed. 220. *See "Courts," Dec. Dig. (Key-No.) § 295; Cent. Dig. § 837.*

the title in litigation traces back to the United States, where no question of the effect of the federal link in the title is involved, but merely conflicting questions of title between diverse claimants.[76]

SAME—CONTROVERSIES BETWEEN CITIZENS OF DIFFERENT STATES—NATURAL PERSONS

100. In suits involving over $3,000, the jurisdiction extends to cases involving controversies between citizens of different states. The word "citizen," in this connection, is not used in the political sense of a voter, but in the sense of being a permanently domiciled member or subject of a state. Citizenship of the state and of the United States must both concur.

In considering what is meant in the Constitution and statutes by "citizens of different states," the question will first be discussed as to natural persons.

The word "citizen" is not used in this connection in its political sense, or in reference to any political rights, like the right to vote. It is used in the sense of its original definition; that is, as an integral part of the membership of a state, or a subject of a state. It means those who have a permanent domicile in a state, and not those who may merely have a temporary residence there. The distinction between "domicile" and "residence" is well known in the law. The meaning of "domicile" is explained in Mitchell

[76] St. Paul & N. P. Ry. Co. v. St. Paul, M. & M. R. Co., 68 Fed. 2, 15 C. C. A. 167; Id., 18 Sup. Ct. 946, 42 L. Ed. 1212; Northern Pac. R. Co. v. Soderberg, 188 U. S. 526, 23 Sup. Ct. 365, 47 L. Ed. 575; Shulthis v. McDougal, 225 U. S. 561, 32 Sup. Ct. 704, 56 L. Ed. 1205. *See "Courts," Dec. Dig. (Key-No.) § 285; Cent. Dig. §§ 827, 828.*

v. U. S.[77] It is defined as a "residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time; and, when once acquired, it is presumed to continue until positive proof of change." In order to give jurisdiction to the federal courts on this ground, two things must concur: The parties must be citizens of a state, in the sense of being regularly domiciled in that state, and not having a mere temporary residence there; and they must also be citizens of the United States, within the requirements of the fourteenth amendment, which provides that all persons born or naturalized in the United States are citizens of the United States and of the state where they reside. A party may be a citizen of the United States, and yet the federal courts would not have jurisdiction on the ground of citizenship. For instance, a person having his permanent abode in the District of Columbia is a citizen of the United States, but the federal courts have no jurisdiction on the ground of citizenship where he is on one side of a controversy, as the District of Columbia is not a state.[78]

So a party regularly domiciled in a territory is a citizen of the United States, but he is not a citizen of a state, and therefore cannot give jurisdiction to the federal courts.[79]

On the other hand, a party may be regularly domiciled in a state, and a citizen of a state in the political sense of the word, and yet the federal courts would not have jurisdiction unless he is also a citizen of the United States. For

[77] 21 Wall. 350, 22 L. Ed. 584; Ex parte Petterson (D. C.) 166 Fed. 536; Pickering v. Winch, 48 Or. 500, 87 Pac. 763, 9 L. R. A. (N. S.) 1159; Anderson v. Blakesly (Iowa) 136 N. W. 210. *See "Courts," Dec. Dig. (Key-No.) § 307; Cent. Dig. §§ 850–854; "Domicile," Dec. Dig. (Key-No.) § 2; Cent. Dig. § 2.*

[78] Barney v. Baltimore, 6 Wall. 280, 18 L. Ed. 825; Hooe v. Jamieson, 166 U. S. 395, 17 Sup. Ct. 596, 41 L. Ed. 1049. *See "Courts," Dec. Dig. (Key-No.) § 307; Cent. Dig. §§ 850–854.*

[79] Watson v. Bonfils, 116 Fed. 157, 53 C. C. A. 535; Clark v. Southern Pac. Co. (C. C.) 175 Fed. 122. *See "Courts," Dec. Dig. (Key-No.) § 307; Cent. Dig. §§ 850–854.*

instance, an alien who has never been naturalized cannot be a proper party to a suit in the federal courts based on the ground of diverse citizenship, though the state may have given an unnaturalized alien the right to vote.[80]

That citizenship of the United States alone is not sufficient to confer jurisdiction is well settled.[81]

Mere residence is not sufficient to confer jurisdiction, but domicile is required.[82]

The fact that citizenship, in this connection, does not mean political citizenship or the right to vote, is illustrated by the fact that women who have no right to vote can still sue in the federal courts on the ground of diverse citizenship; and the same rule applies to infants.[83]

In considering the question of domicile, the ordinary rules of law in reference to the domicile of different parties apply. For instance, the domicile of a child is that of the parent.[84]

An interesting case on this point is Lamar v. Micou,[85] which holds that the infant's domicile was that of the fa-

[80] Poppenhauser v. India-Rubber Comb Co. (C. C.) 14 Fed. 707; Lanz v. Randall, Fed. Cas. No. 8,080. *See "Courts," Dec. Dig. (Key-No.) § 307; Cent. Dig. §§ 850–854.*

[81] Nichols v. Nichols (C. C.) 92 Fed. 1; Pope v. Williams, 193 U. S. 621, 24 Sup. Ct. 573, 48 L. Ed. 814. *See "Courts," Dec. Dig. (Key-No.) § 307; Cent. Dig. §§ 850–854.*

[82] Wolfe v. Hartford Life & Annuity Ins. Co., 148 U. S. 389, 13 Sup. Ct. 602, 37 L. Ed. 493; Neel v. Pennsylvania Co., 157 U. S. 153, 15 Sup. Ct. 589, 39 L. Ed. 654; Collins v. Ashland (D. C.) 112 Fed. 175; Harding v. Standard Oil Co. (C. C.) 182 Fed. 421. *See "Courts," Dec. Dig. (Key-No.) § 307; Cent. Dig. §§ 850–854.*

[83] Minor v. Happersett, 21 Wall. 162, 169, 22 L. Ed. 627; Blumenthal v. Craig, 81 Fed. 320, 26 C. C. A. 427. *See "Courts," Dec. Dig. (Key-No.) § 307; Cent. Dig. §§ 850–854.*

[84] Dresser v. Edison Illuminating Co. (C. C.) 49 Fed. 257; Hess v. Kimble, 79 N. J. Eq. 230, 81 Atl. 363. *See "Courts," Dec. Dig. (Key-No.) § 307; Cent. Dig. §§ 850–854; "Domicile," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 24–35.*

[85] 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751. *See "Courts," Dec. Dig. (Key-No.) § 307; Cent. Dig. §§ 850–854; "Domicile," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 24–35.*

ther or the widowed mother, but did not change, when the mother remarried, to the domicile of the second husband, nor to that of a guardian at a mere temporary residence of the child. So, too, the domicile of the wife is that of the husband where they are not living apart under a legal separation.[86]

Domicile may often be proved by declarations, provided the court is satisfied that the declaration was not made for the purpose of manufacturing evidence on the subject.[87]

A domicile may be actually acquired, and, though acquired for the purpose of enabling the party to sue in the federal courts, it is still his domicile, and entitles him, under such circumstances, to sue; but, if the change of domicile is merely colorable, the court will dismiss any suit of its own motion.[88]

A state cannot sue in the federal courts on the ground of diverse citizenship, as a state cannot, in the nature of things, be a citizen of a state.[89]

In considering the parties for the purpose of jurisdiction, the court looks at the character of the party on the record who is the actual dominus litis, not at mere nominal parties or parties beneficially interested. For instance, where a bond is made payable to a state or marshal, any suit brought by the party interested in the breach of the bond as relator is governed by his citizenship, and not by the

[86] Nichols v. Nichols (C. C.) 92 Fed. 1. *See "Courts," Dec. Dig. (Key-No.) § 307; Cent. Dig. §§ 850–854; "Domicile," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 24–35.*

[87] Doyle v. Clark, Fed. Cas. No. 4,053. *See "Courts," Dec. Dig. (Key-No.) § 323; Cent. Dig. § 885; "Domicile," Dec. Dig. (Key-No.) §§ 8–10; Cent. Dig. §§ 36–39.*

[88] Morris v. Gilmer, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690; Barney v. Baltimore, 6 Wall. 280, 18 L. Ed. 825. *See "Courts," Dec. Dig. (Key-No.) § 307; Cent. Dig. §§ 850–854.*

[89] Postal Tel. Cable Co. v. Alabama, 155 U. S. 482, 15 Sup. Ct. 192, 39 L. Ed. 231. *See "Courts," Dec. Dig. (Key-No.) § 307; Cent. Dig. §§ 850–854; "Removal of Causes," Dec. Dig. (Key-No.) §§ 26, 40; Cent. Dig. §§ 60–63, 81.*

citizenship of the formal payee, who has no actual interest in the suit.[90]

For the same reason, where a suit is brought by a party in a representative character, his citizenship, and not that of the parties for whose benefit the suit is really brought, is the test. An illustration of this is a suit by a trustee, in which case his citizenship, and not that of the beneficiaries, governs.[91]

So, in a suit by an administrator, his citizenship, and not that of the beneficiaries in the estate, is the test.[92]

The same principle applies to the suit of a guardian for the benefit of his ward, where the guardian can sue in his own name.[93]

On the other hand, a suit by a minor through his next friend is regulated by the citizenship of the minor, as a next friend is strictly hardly a party to the suit at all.[94]

If the relation of the parties is such at the institution of suit as to give the court jurisdiction, the substitution of new parties, or the change of residence of the old parties, will not divest a jurisdiction once acquired.[95]

[90] Indiana ex rel. Stanton v. Glover, 155 U. S. 513, 15 Sup. Ct. 186, 39 L. Ed. 243; Howard v. U. S., 184 U. S. 676, 22 Sup. Ct. 543, 546, 46 L. Ed. 754; Hollenbach v. Elmore & H. Contracting Co. (C. C.) 174 Fed. 845. Compare United States Fidelity & Guaranty Co. v. U. S., 204 U. S. 349, 27 Sup. Ct. 381, 51 L. Ed. 516. *See "Courts," Dec. Dig. (Key-No.) § 309; Cent. Dig. § 857.*

[91] Blumenthal v. Craig, 81 Fed. 320, 26 C. C. A. 427. *See "Courts," Dec. Dig. (Key-No.) § 311; Cent. Dig. § 858.*

[92] Cincinnati, H. & D. R. Co. v. Thiebaud, 114 Fed. 918, 52 C. C. A. 538. *See "Courts," Dec. Dig. (Key-No.) § 311; Cent. Dig. § 858.*

[93] Mexican Cent. R. Co. v. Eckman, 187 U. S. 429, 23 Sup. Ct. 211, 47 L. Ed. 245. *See "Courts," Dec. Dig. (Key-No.) § 311; Cent. Dig. § 858.*

[94] Blumenthal v. Craig, 81 Fed. 320, 26 C. C. A. 427. *See "Courts," Dec. Dig. (Key-No.) § 311; Cent. Dig. § 858.*

[95] Hardenbergh v. Ray, 151 U. S. 112, 14 Sup. Ct. 305, 38 L. Ed. 93; Collins v. Ashland (D. C.) 112 Fed. 175. *See "Courts," Dec. Dig. (Key-No.) §§ 317, 319; Cent. Dig. § 864.*

CHAPTER XII

THE DISTRICT COURT (Continued)—ORIGINAL JURISDICTION (Continued)

101. Same—Same—Corporations.
102. Same—Same—Plurality of Litigants.
103. Same—Controversies between Citizens of a State and Foreign States, Citizens, or Subjects.
104. Same—Venue of Actions.
105. Same—Same—Rule when Litigants are Numerous.
106. Same—Same—Suits against Defendants of Different Districts in Same State, and Suits in Rem.

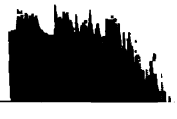
SAME—SAME—CORPORATIONS

101. For purposes of federal jurisdiction a corporation is considered a citizen of the state which gives it its charter.

Frequently corporations hold legislative power from more than one state. In such case a mere license or enabling act does not make it a corporation of the second state also.

1. How Far a Citizen of the State Creating It

At the time of the adoption of the Constitution the part played by corporations in the business of the country was slight. It is a matter of doubt whether the framers of the Constitution had them in mind at all. Consequently, when the question was first raised whether a corporation was a citizen in the sense in which that term was used in reference to the jurisdiction of the federal courts, it was decided that a corporation could only be treated as a citizen, for the purposes of jurisdiction, in case all the corporators composing the corporation were citizens of the state of



its creation, and this was a matter of averment and proof in each case.[1]

This remained the doctrine for a great many years, but the increasing importance of corporations rendered it necessary for the court to consider the question more thoroughly, and consequently, in Louisville, C. & C. R. Co. v. Letson,[2] the Supreme Court based the jurisdiction of the federal courts over corporations on the theory that the corporation was itself an inhabitant of the state of its creation, contracting in its own name, and having a legal existence independent of its membership.

It has been seen that the word "citizen" is not used in its political sense, but means a person with a permanent domicile, or a subject. Hence, when this last test was laid down by the court, it came pretty close to the doctrine which had been applied in the case of individuals. But not content with this, the court did not take long to go a step further to the final conclusion that after all, when a corporation is chartered by a state, there is a conclusive presumption that its corporators are all citizens of the same state; that, properly speaking, the individual stockholders are not parties at all, but that the corporation stands in the position of their representative or trustee; and hence an averment that a corporation is incorporated under the laws of a certain state shows that it has a domicile in or is a subject or citizen of that state.[3]

The test laid down in this latter case is that, in order

[1] Bank of U. S. v. Deveaux, 5 Cranch, 61, 3 L. Ed. 38; Commercial & R. Bank of Vicksburg v. Slocomb, 14 Pet. 60, 10 L. Ed. 354. *See "Corporations," Dec. Dig. (Key-No.) § 52; Cent. Dig. §§ 140–150; "Courts," Dec. Dig. (Key-No.) §§ 274, 293, 294, 314; Cent. Dig. §§ 814, 835, 836, 860.*

[2] 2 How 497, 11 L. Ed. 353. *See "Courts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 860.*

[3] ST. LOUIS & S. F. R. CO. v. JAMES, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802. Compare Doctor v. Harrington, 196 U. S. 579, 25 Sup. Ct. 355, 49 L. Ed. 606. *See "Courts," Dec. Dig. (Key-No.) §§ 274, 314; Cent. Dig. §§ 814, 860.*

to make a corporation a citizen in the spirit and letter of the Constitution, it must be created out of natural persons whose citizenship of the state creating it could be imputed to the corporation itself. Hence it follows, from the ground on which these decisions have rested, that the allegation that a corporation is a citizen of a state is meaningless, but the allegation should be that it is a corporation organized under the laws of that state.[4]

The principle of this line of decisions applies as well to foreign corporations as to those organized under the laws of a state. They, too, are conclusively presumed to be composed of citizens or subjects of the foreign government creating them.[5]

Nor does a state requirement that they become domiciled in a state in order to obtain a license to do business affect their status for purposes of jurisdiction.[6]

Under section 24, par. 16, of the Judicial Code, a national bank, for purposes of jurisdiction, is treated as a corporation of the state in which it is located.[7]

A corporation organized under the laws of a territory becomes a corporation of a state when the territory becomes a state.[8]

But these principles apply only to corporations. They do not apply to unincorporated associations, nor to joint-stock companies which are not so organized as to amount

[4] Baltimore & O. R. Co. v. McLaughlin, 73 Fed. 519, 19 C. C. A. 551; Thomas v. Ohio State University, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. Ed. 160. *See "Courts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 860.*

[5] National S. S. Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87. *See "Courts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 860.*

[6] St. Louis & S. F. R. Co. v. Cross (C. C.) 171 Fed. 480. *See "Courts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 860.*

[7] CONTINENTAL NAT. BANK OF MEMPHIS v. BUFORD, 191 U. S. 119, 24 Sup. Ct. 54, 48 L. Ed. 119. *See "Courts," Dec. Dig. (Key-No.) §§ 294, 314; Cent. Dig. §§ 836, 860.*

[8] Shulthis v. McDougal, 225 U. S. 561, 32 Sup. Ct. 704, 56 L. Ed. 1205. *See "Courts," Dec. Dig. (Key-No.) §§ 314, 382; Cent. Dig. § 860.*

to corporations.[9] Nor do they apply to partnerships or limited partnership associations so long as they are not imbued with the character of corporations.[10]

Status of Corporations under Legislation of More than One State

This is one of the most difficult questions in federal jurisprudence. Its difficulty arises from the fact that whether the corporation is a corporation of one state or the other, or of both states granting them privileges, is a question of legislative intent, dependent upon the statute to be passed upon in each case.

The mere grant to a corporation already organized under the laws of one state of a privilege or license by another state does not constitute it a corporation of the second state. Though the legislation of the second state goes so far as to require the corporation to file its charter in some office of the second state and agree to be considered a domestic corporation of that state, it still remains a corporation of the first state, and the legislation of the second state is not construed as amounting to incorporation.[11]

So, too, where the second state recites the charter granted by the first state, and goes on to give the same powers and impose the same duties, that is construed as a mere license, and not as creating a new corporation.[12]

[9] Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800; Roundtree v. Adams Express Co., 165 Fed. 152, 91 C. C. A. 186; Weir v. Rountree, 216 U. S. 607, 30 Sup. Ct. 418, 54 L. Ed. 635; Irving v. Joint District (C. C.) 180 Fed. 896 (a labor union). *See "Courts," Dec. Dig. (Key-No.) § 315; Cent. Dig. § 861.*

[10] Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 842; H. L. Bruett v. Austin Drainage Ex. Co. (C. C.) 174 Fed. 668 (a partnership). *See "Courts," Dec. Dig. (Key-No.) § 315; Cent. Dig. § 861.*

[11] ST. LOUIS & S. F. R. CO. v. JAMES, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802; Missouri Pac. R. Co. v. Castle, 224 U. S. 541, 32 Sup. Ct. 606, 56 L. Ed. 875. *See "Courts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 860.*

[12] Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 20 L. Ed. 354; Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, 26 L. Ed. 643; Atlantic

In order for the legislation of the second state to constitute a new corporation of that state, the language used must go so far as to imply actual creation, not a mere recognition of a previous creation.[13]

On the other hand, when the intent of the second state to create a new corporation is clear, the effect is, in contemplation of law, that there are two corporations. There is, first, the corporation of the original state, which owes its existence to that state, and cannot be regenerated by another state; and there is, second, the new corporation of the second state, owing its existence and allegiance to the second state. These two corporations may in name be one, may have the same stockholders, own the same property, and even be operated as a unit, but they still retain their character as distinctive and separate corporations.[14]

The character of legislation which will constitute an additional corporation is illustrated by Memphis & C. R. Co. v. Alabama.[15] In this case a railroad had already been chartered in Tennessee, but by an act of the Legislature of Alabama a corporation under the same name was authorized to take subscriptions to capital stock in Alabama, required to have a place for the stockholders to meet in Alabama, and to do various other things consistent only with the idea of its being an Alabama corporation. When it was sued in Alabama on a tax question arising under the laws of Alabama, the Supreme Court held that the intent of the Legislature of Alabama to make a separate corpora-

Coast Line R. Co. v. Dunning, 166 Fed. 850, 94 C. C. A. 128. *See "Courts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 860.*

[13] Louisville, N. A. & C. R. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081. *See "Courts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 860.*

[14] Ohio & M. R. Co. v. Wheeler, 1 Black, 286, 17 L. Ed. 130. *See "Courts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 860.*

[15] 107 U. S. 581, 2 Sup. Ct. 432, 27 L. Ed. 518. *See "Corporations," Dec. Dig. (Key-No.) § 52; Cent. Dig. §§ 140–150; "Courts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 860; "Removal of Causes," Dec. Dig. (Key-No.) § 27; Cent. Dig. §§ 64–68.*

tion was clear, and that as to such a procedure it must necessarily be considered a corporation of Alabama, and could not remove the case into the federal courts on the ground of its being a nonresident.

Where there is double legislation by two states, though the legislation of the second state may amount to incorporation, the original corporation organized by the first state still remains.[16]

Difficult questions under this branch of jurisdiction arise when corporations of different states are consolidated. In such case each corporation, as a rule, retains its original citizenship, and, when sued, the corporation is supposed to be a corporation of the state where it was sued, and hence could not be sued by a citizen of that state.[17] But when a new corporation is organized, and the old corporations, under a consolidation agreement, convey their properties to the new corporation and wind up, then the new corporation is treated as a citizen of the state which organizes it.[18]

When a corporation acting under the laws of two states brings a suit, the question as to its citizenship depends on the question which of the original corporations is actually suing; for if, in contemplation of law, there are still two separate corporations, and the corporation first organized remains a corporation of the original state and loses no rights by going into another state, then, clearly, in such case, it may be the original corporation which is suing,

[16] Louisville, N. A. & C. R. Co. v. Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081. *See "Courts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 860; "Removal of Causes," Dec. Dig. (Key-No.) § 27; Cent. Dig. §§ 64–68.*

[17] Baldwin v. Railroad Co. (C. C.) 86 Fed. 167; Smith v. New York, N. H. & H. Railroad Co. (C. C.) 96 Fed. 504. *See "Courts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 860; "Removal of Causes," Dec. Dig. (Key-No.) § 27; Cent. Dig. §§ 64–68.*

[18] Westheider v. Railroad Co. (C. C.) 115 Fed. 840. *See "Courts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 860; "Removal of Causes," Dec. Dig. (Key-No.) § 27; Cent. Dig. §§ 64–68.*

and not the corporation of the second state. This doctrine is illustrated by comparing the two cases of Ohio & M. R. Co. v. Wheeler [19] and Nashua & L. R. Corp. v. Boston & L. R. Corp.[20] In the first a corporation describing itself as created by the laws of the states of Indiana and Ohio, and having its principal place of business in Ohio, and a citizen of Ohio, sued a citizen of Indiana in the Indiana federal court. The Supreme Court held, on this allegation of the pleadings, that it was not a single corporation under the joint laws of Ohio and Indiana, but that there were, in contemplation of law, two separate corporations, one conclusively presumed to be composed of citizens of the state of Ohio, and the other conclusively presumed to be composed of citizens of the state of Indiana. Hence it was the same as if a citizen of Ohio and a citizen of Indiana sued a citizen of Indiana in the federal courts, and thus, as citizens of Indiana were on two different sides of the controversy, it was not a case of which the court had jurisdiction. On the other hand, in the second case, the Nashua Corporation, alleging itself to be a corporation of the state of New Hampshire, sued a corporation of the state of Massachusetts. It appeared from an examination of the legislation of the two states that a corporation had been chartered by the state of New Hampshire composed of seven corporators, and subsequently a corporation of the same name by the state of Massachusetts composed of three of these same corporators, and that by subsequent legislation the stockholders and property of the two corporations were blended into one for all practical operating purposes. The Supreme Court held, however, that it had to consider that it was a New Hampshire corporation

[19] 1 Black, 286, 17 L. Ed. 130. *See "Courts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 860; "Removal of Causes," Dec. Dig. (Key-No.) § 27; Cent. Dig. §§ 64–68.*

[20] 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. Ed. 363. *See "Courts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 860; "Removal of Causes," Dec. Dig. (Key-No.) § 27; Cent. Dig. §§ 64–68.*

which was suing, and not the Massachusetts corporation, and hence that the federal court for the district of Massachusetts had jurisdiction.

SAME—SAME—PLURALITY OF LITIGANTS

102. In the case of more than one plaintiff or defendant, the federal jurisdiction cannot be acquired by diverse citizenship when any one or more of the parties on either side is a citizen of the same state as any one or more on the other side; but only a party can defeat the jurisdiction who is an indispensable party to the suit, and the omission of parties not indispensable is authorized by statute and court rule in aid of the federal jurisdiction.

Jurisdiction as Affected by the Number of Litigants

Heretofore the discussion has been on the theory that there is but one party on each side of the litigation. A more numerous class is where there is more than one litigant on each side. In this case it is a doctrine of the federal courts that the terms "plaintiff" and "defendant" are used collectively, and mean that all the plaintiffs must be capable of suing all the defendants; that is, that all the parties on each side of the litigation must be of different citizenship. Hence a citizen of New York and a citizen of Massachusetts cannot sue a citizen of Massachusetts in the federal courts, as that would not be a controversy between citizens of different states.[21]

The jurisdiction, however, depends only upon those who are indispensable as parties, and in order to obviate, as

[21] Peninsular Iron Co. v. Stone, 121 U. S. 631, 7 Sup. Ct. 1010, 30 L. Ed. 1030; FLORIDA CENT. & P. R. CO. v. BELL, 176 U. S. 321, 20 Sup. Ct. 399, 44 L. Ed. 486; Key West Cigar Mfg. Ass'n v. Rosenbloom (C. C.) 171 Fed. 296. *See "Courts," Dec. Dig. (Key-No.) §§ 308, 314; Cent. Dig. §§ 855, 856, 860.*

far as possible, the inconvenience of having the jurisdiction defeated, section 50 of the Judicial Code reads as follows:

"When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and nonjoinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

This authorizes the omission of parties only on the ground of their absence from the jurisdiction and the inability to reach them with process, but not where they are necessary parties and in reach of process.

For instance, in Allnut v. Lancaster,[22] there were 114 defendants, all in reach of the court's process, and it was held that in such case it was necessary to make them parties. This statute applies both to common law and equity, and authorizes the omission even of those who would, under ordinary rules of practice, be considered as necessary parties, provided the decree, when rendered, does not so change the state of affairs as to injuriously affect the interests of the absent party. Hence, in Clearwater v. Meredith,[23] it was held that where there were four guarantors in a contract, one of whom was out of the jurisdiction, the other three could be sued and the absent one could be omit-

[22] (C. C.) 76 Fed. 131. See, also, Shearson v. Littleton (C. C.) 105 Fed. 533; Jackson v. Jackson, 175 Fed. 710, 99 C. C. A. 286. *See "Courts," Dec. Dig. (Key-No.) §§ 308–310; Cent. Dig. §§ 855–857.*

[23] 21 How. 489, 16 L. Ed. 201. *See "Courts," Dec. Dig. (Key-No.) §§ 308–310; Cent. Dig. §§ 855–857.*

ted, as in such case the judgment would not bind him, and he would still be free to defend just as if no suit had ever been brought against the others. So, in Inbusch v. Farwell,[24] a suit against the administrator of one partner and two sureties on a bond signed by them, and also by two other partners, was sustained, the other partner being inaccessible. But where the omitted parties are what may be termed indispensable parties, being so necessary that a decree without their presence would prejudice their rights and leave the case in a shape contrary to equity and good conscience, the statute does not apply, and the jurisdiction of the court would not attach.[25]

In addition to the above statute, the thirty-ninth equity rule provides as follows:

"In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in its discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

This rule, however, applies only to equity cases. It is broader than the statute above quoted, because it applies not only to a defect of parties, due to their being out of reach of process, but also to parties within the reach of process, whose joinder would oust the jurisdiction of the court. Under this rule and the above statute, parties in the federal courts need not be so numerous as in the or-

[24] 1 Black, 566, 17 L. Ed. 188. *See "Courts," Dec. Dig. (Key-No.) §§ 308–310; Cent. Dig. §§ 855–857.*

[25] Barney v. Baltimore, 6 Wall. 280, 18 L. Ed. 825; Ober v. Gallagher, 93 U. S. 199, 23 L. Ed. 829; Waterman v. Canal-Louisiana Bank & T. Co., 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80. *See "Courts," Dec. Dig. (Key-No.) § 310; Cent. Dig. § 857.*

dinary chancery courts, and many who would ordinarily be made parties are not necessarily so made in the federal courts. The leading case on this subject is Shields v. Barrow.[26] This case classifies parties in the federal courts into formal, necessary, and indispensable, holding that only the latter class are the ones whose absence would completely defeat the jurisdiction. Parties who are ordinarily considered necessary parties would not defeat the jurisdiction of the federal court, if the court can proceed without prejudicing their rights or leaving the record at final decree in a shape contrary to equity and good conscience.

Substantially the same rule is laid down in Williams v. Bankhead,[27] where the court says: "The general rule as to parties in chancery is, that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule, arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: First. Where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Secondly. Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached. Thirdly. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may

[26] 17 How. 130, 15 L. Ed. 158; Federal Mining & Smelting Co. v. Bunker Hill & S. M. Co. (C. C.) 187 Fed. 474. *See "Courts," Dec. Dig. (Key-No.) §§ 308–310; Cent. Dig. §§ 855–857.*

[27] 19 Wall. 563, 22 L. Ed. 184. See, also, Minnesota v. Securities Co., 184 U. S. 199, 22 Sup. Ct. 308, 46 L. Ed. 499; Kuchler v. Greene (C. C.) 163 Fed. 91; South Penn Oil Co. v. Miller, 175 Fed. 729, 99 C. C. A. 305. *See "Courts," Dec. Dig. (Key-No.) §§ 308–310; Cent. Dig. §§ 855–857.*

be conveniently settled in the suit and thereby prevent further litigation, he may be a party, or not, at the option of the complainant."

An illustration of parties who are merely formal in the sense of this statute and rule is given by Walden v. Skinner.[28] In this case the executors of a trustee, who were joined for the mere purpose of conveying a title, but against whom no personal relief was prayed, were held to be merely formal.

So, too, in Einstein v. Georgia Southern & F. R. Co.,[29] where two of three trustees sued as plaintiffs, and another refused to join and was therefore made defendant, he was held to be only a formal party. An ordinary trustee, unless the instrument creating him is very restricted in conferring powers upon him, represents the beneficiaries, and therefore the latter are not necessary parties.[30]

When a trustee is made a party defendant and no relief is prayed against him, he would not defeat the jurisdiction; but where there are charges against him, and therefore relief is prayed, he is a necessary party, and would defeat the jurisdiction if it places two citizens of the same state on opposite sides.[31] There are, however, many cases where parties have been held indispensable and their joinder defeats the jurisdiction on that account. In Williams v. Bankhead [32] the claimant of a fund was held

[28] 101 U. S. 577, 25 L. Ed. 963. *See "Courts," Dec. Dig. (Key-No.) § 309; Cent. Dig. § 857.*

[29] (C. C.) 120 Fed. 1008. See Atchison, T. & S. F. R. Co. v. Phillips, 176 Fed. 663, 100 C. C. A. 215. *See "Courts," Dec. Dig. (Key-No.) §§ 308–310; Cent. Dig. §§ 855–857.*

[30] Kerrison v. Stewart, 93 U. S. 155, 23 L. Ed. 843; Dodge v. Tulleys, 144 U. S. 451, 12 Sup. Ct. 728, 36 L. Ed. 501; Allen-West Commission Co. v. Brashear (C. C.) 176 Fed. 119. *See "Courts," Dec. Dig. (Key-No.) §§ 308–310; Cent. Dig. §§ 855–857.*

[31] Post v. Buckley (C. C.) 119 Fed. 249. *See "Courts," Dec. Dig. (Key-No.) §§ 308–310; Cent. Dig. §§ 855–857.*

[32] 19 Wall. 563, 22 L. Ed. 184. *See "Courts," Dec. Dig. (Key-No.) §§ 308–310; Cent. Dig. §§ 855–857.*

to be a necessary party. So in Massachusetts & S. Const. Co. v. Cane Creek Tp., which was a suit to recover bonds in the possession of a third party, raising certain questions as to the contract under which they were placed with that party, it was held that the custodian of the bonds, though only a stakeholder, was an indispensable party.[33]

In many cases a jurisdiction may be given by dismissing the suit as to parties who would otherwise defeat it.[34]

In deciding upon the jurisdiction, the court does not consider itself bound by the arrangement which the pleader has chosen to give the parties on the record. It will arrange them according to their actual interest, and then decide whether the jurisdiction can be sustained.[35]

SAME—CONTROVERSIES BETWEEN CITIZENS OF A STATE AND FOREIGN STATES, CITIZENS, OR SUBJECTS

103. In civil suits involving over $3,000, the federal jurisdiction extends to controversies between citizens of a state and foreign states, citizens, or subjects.

[33] 155 U. S. 283, 15 Sup. Ct. 91, 39 L. Ed. 152; New Orleans Waterworks Co. v. New Orleans, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518. *See "Courts," Dec. Dig. (Key-No.) §§ 308–310; Cent. Dig. §§ 855–857.*

[34] Horn v. Lockhart, 17 Wall. 570, 21 L. Ed. 657; Mason v. Dullagham, 82 Fed. 689, 27 C. C. A. 296; Hopkins v. Stave Co., 83 Fed. 912, 28 C. C. A. 99; Delaware, L. & W. R. Co. v. Frank (C. C.) 110 Fed. 689; Ladew v. Tennessee Copper Co. (C. C.) 175 Fed. 245; Id., 218 U. S. 357, 31 Sup. Ct. 81, 54 L. Ed. 1069; Id., 218 U. S. 369, 31 Sup. Ct. 84, 54 L. Ed. 1073. *See "Courts," Dec. Dig. (Key-No.) § 318; Cent. Dig. § 863.*

[35] First Nat. Bank v. Trust Co., 80 Fed. 569, 26 C. C. A. 1; Johnson v. Ford (C. C.) 109 Fed. 501; Joseph Dry Goods Co. v. Hecht, 120 Fed. 760, 57 C. C. A. 64; Kelly v. Mississippi Valley Coaling Co. (C. C.) 175 Fed. 482; Helm v. Zarecor, 222 U. S. 32, 32 Sup. Ct. 10, 56 L. Ed. 77. *See "Courts," Dec. Dig. (Key-No.) § 317.*

A foreign state may sue in the courts of another country, and it would be a breach of international courtesy not to allow it so to do.[36]

An illustration of a suit by a foreign state is given in the case of Republic of Colombia v. Cauca Co.,[37] which was a suit by the republic of Colombia to set aside an award of arbitrators.

Citizens or subjects of foreign states are usually designated in the case as aliens, although that is not the language of the statute. The court has jurisdiction of a suit under this clause, although the alien sued or suing resides in the United States,[38] and though the plaintiff is not a citizen of the state where suit is brought.[39]

For the purposes of jurisdiction under this clause, a foreigner remains an alien until he is completely naturalized. He does not become a citizen by taking out his preliminary naturalization papers, though the state laws give such a party the right to vote.[40]

On the other hand, a citizen of the United States does not become an alien by a mere change of residence from the United States. It must appear that the change is permanent, and that an obligation to the new sovereign has been distinctly assumed.[41]

[36] The Sapphire v. Napoleon III, 11 Wall. 164, 20 L. Ed. 127. *See "Courts," Dec. Dig. (Key-No.) § 321; Cent. Dig. §§ 847–849.*

[37] (C. C.) 106 Fed. 337; Republic of Columbia v. Cauca Co., 113 Fed. 1020, 51 C. C. A. 604; Id., 190 U. S. 524, 23 Sup. Ct. 704, 47 L. Ed. 1159. *See "Courts," Dec. Dig. (Key-No.) § 321; Cent. Dig. §§ 847–849.*

[38] Breedlove v. Nicolet, 7 Pet. 413, 8 L. Ed. 731. *See "Courts," Dec. Dig. (Key-No.) § 321; Cent. Dig. §§ 847–849.*

[39] BARROW S. S. CO. v. KANE, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964. *See "Courts," Dec. Dig. (Key-No.) § 321; Cent. Dig. §§ 847–849.*

[40] City of Minneapolis v. Reum, 56 Fed. 576, 6 C. C. A. 31; Frick v. Lewis, 195 Fed. 693, 697, 115 C. C. A. 493. *See "Courts," Dec. Dig. (Key-No.) § 321; Cent. Dig. §§ 847–849.*

[41] Bishop v. Averill (C. C.) 76 Fed. 386; Winans v. Attorney General [1904] App. Cas. 287. *See "Courts," Dec. Dig. (Key-No.) § 321; Cent. Dig. §§ 847–849.*

If, however, a female citizen of the United States marries a Canadian and goes with him to his permanent home, her national character is determined by her husband's residence, and she becomes a subject of Great Britain.[42] On the other hand, independent of statute, a female citizen of the United States, by marrying a resident unnaturalized alien, does not thereby become an alien herself, they continuing to reside in the United States.[43]

A citizen of Cuba after the Spanish War is a citizen of a foreign state, notwithstanding the close relations between that country and the United States. She is Cuba Libre.[44]

In view of the constant practice of nations to appoint citizens of other nations as consuls, there is no presumption that a person so appointed by a foreign country is an alien.[45]

This clause of the statute gives jurisdiction simply between citizens of this country and foreign states, citizens, or subjects. Hence it does not confer jurisdiction in controversies between citizens of two foreign states,[46] nor in

[42] Jenns v. Landes (C. C.) 85 Fed. 801. *See "Citizens," Dec. Dig. (Key-No.) § 8; Cent. Dig. § 7; "Courts," Dec. Dig. (Key-No.) § 321; Cent. Dig. §§ 847–849.*

[43] Comitis v. Parkerson (C. C.) 56 Fed. 556, 22 L. R. A. 148; Wallenburg v. Missouri P. R. Co. (C. C.) 159 Fed. 217. These cases arose before the expatriation act of March 2, 1907 (34 Stat. 1228, c. 2534, [U. S. Comp. St. Supp. 1911, p. 490]). This act was entitled "An act in reference to the expatriation of citizens and their protection abroad," and its third section provided that any American woman who marries a foreigner should take the nationality of her husband, but could resume her American citizenship at the termination of the marital relation. See In re Martorana (D. C.) 159 Fed. 1010, 171 Fed. 397. *See "Citizens," Dec. Dig. (Key-No.) § 8; Cent. Dig. § 7; "Courts," Dec. Dig. (Key-No.) § 321; Cent. Dig. §§ 847–849.*

[44] Betancourt v. Association (C. C.) 101 Fed. 305. *See "Courts," Dec. Dig. (Key-No.) § 321; Cent. Dig. §§ 847–849.*

[45] Börs v. Preston, 111 U. S. 252, 4 Sup. Ct. 407, 28 L. Ed. 419. *See "Courts," Dec. Dig. (Key-No.) § 301; Cent. Dig. §§ 842, 885.*

[46] Pooley v. Luco (C. C.) 72 Fed. 561; Gage v. Riverside Trust Co. (C. C.) 156 Fed. 1002. *See "Courts," Dec. Dig. (Key-No.) § 321; Cent. Dig. §§ 847–849.*

controversies between citizens of foreign states and citizens of the District of Columbia, as the latter is not a state.[47]

Pleadings must Show the Jurisdiction

The courts hold that an averment must clearly show that an alien is a citizen of a foreign power. In Stuart v. City of Easton[48] the Supreme Court held that an averment that a party on whom jurisdiction depended was a citizen of London, England, was not sufficient for the purpose of jurisdiction. The opinion is very short, and it is not entirely clear wherein the defect consists. Probably it was that the averment simply showed citizenship of the city of London, but did not show necessarily that the party was a citizen or subject of Great Britain. Soon after this decision Judge Taft, speaking for the circuit court of appeals, held, in Rondot v. Rogers Tp.,[49] that the proper averment should allege not only that the party was a subject, but also expressly that he was an alien, although, as above stated, the word "alien" is not used in the statute at all. But in the later case of Hennessy v. Richardson Drug Co.[50] the Supreme Court held that it was not necessary to expressly aver the alienage, and that an averment that the complainants were "all of Cognac in France,

[47] Land Co. of New Mexico v. Elkins (C. C.) 20 Fed. 545. *See "Courts," Dec. Dig. (Key-No.) § 321; Cent. Dig. §§ 847–849.*

[48] 156 U. S. 46, 15 Sup. Ct. 268, 39 L. Ed. 341. *See "Courts," Dec. Dig. (Key-No.) § 322; Cent. Dig. §§ 876–881.*

[49] 79 Fed. 676, 25 C. C. A. 145. But in Mahoning Valley R. Co. v. O'Hara, 196 Fed. 945, 116 C. C. A. 495, this same court on the authority of the decisions referred to in the next note held an allegation that the plaintiff was "a citizen of Ireland" sufficient. *See "Courts," Dec. Dig. (Key-No.) § 322; Cent. Dig. §§ 876–881.*

[50] 189 U. S. 25, 23 Sup. Ct. 532, 47 L. Ed. 697. In C. H. Nichols Lumber Co. v. Franson, 203 U. S. 278, 27 Sup. Ct. 102, 51 L. Ed. 181, the allegation "a citizen of Sweden" was held sufficient. In fact, the word "citizen" in reference to an alien is practically the equivalent of "subject." *See "Courts," Dec. Dig. (Key-No.) § 322; Cent. Dig. §§ 876–881.*

and citizens of the republic of France," was sufficient for the purposes of jurisdiction.

SAME—VENUE OF ACTIONS

104. Civil suits in the federal courts are to be brought in the judicial district whereof the defendant is an inhabitant, except that, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit may be brought in the district of the residence of the plaintiff, if the defendant be found therein and served with process. This exemption from suit, however, being of the person and not of the subject-matter, any defects are waived by the appearance of the defendant.

Jurisdiction as Affected by Place of Suit

Section 51 of the Judicial Code provides:

"Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

This adopted the policy of the act of March 3, 1887, as corrected August 13, 1888. Prior thereto, the acts provided that suit should not be brought "in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." This change, by omitting the right to sue in the district where

a defendant may be found, renders many of the older decisions obsolete.

In cases arising before the Judicial Code took effect, it was held [51] that under the provisions of the Sherman anti-trust act of July 2, 1890,[52] allowing suits where the defendant resides or is found, suits can be brought in districts where the defendant is not an inhabitant. The language of the Judicial Code is probably to be construed in the same way, as its repealing clause does not specifically mention this act.

On the other hand, a suit by resident shippers to restrain carriers (none of whom reside in the district where suit is brought) from advancing freight rates cannot be sustained.[53]

In considering this question as to the place of suit, it must first be observed that the requirement does not go to jurisdiction over the subject-matter, but merely to jurisdiction over the person, and hence may be waived. If the controversy is between citizens of different states, or involves a federal question, or comes within any other of the provisos defining the jurisdiction over the subject-matter, the courts have jurisdiction of that subject-matter, though suit may be brought in a district where neither the plaintiff nor the defendant resides; and in such cases a general appearance is a waiver of the right to object to jurisdiction over the person. Under the ordinary rules of pleading, a special appearance and a general appearance cannot be combined, but the latter is a waiver of the former; and hence a demurrer which sets up as a ground, not

[51] Standard Oil Co. v. U. S., 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; Michigan Aluminum F. Co. v. Aluminum Castings Co. (C. C.) 190 Fed. 879. *See "Courts," Dec. Dig. (Key-No.) § 271; Cent. Dig. § 810.*

[52] 26 Stat. 209, c. 647 (U. S. Comp. St. 1901, p. 3200).

[53] Macon Grocery Co. v. Atlantic Coast Line R. Co., 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300. *See "Courts," Dec. Dig. (Key-No.) § 272; Cent. Dig. § 811.*

only the exemption from suit in that special district, but other grounds going to the merits, such as want of equity, is treated as a general appearance, and suit may be maintained.[54] Any appearance, consent, or plea which amounts to a general appearance is a waiver of the question of jurisdiction.[55]

It is not a waiver of the jurisdictional privilege, or a consent to be sued in a certain district, for a defendant corporation to appoint an agent on whom process may be served, as required by state statute. Though the corporation actually does business there, this does not give the right to sue it, so far as the jurisdiction depends upon the residence of the defendant.[56]

As this is a personal privilege, only the party can plead it whose residence does not come within its requirements.[57]

This qualification upon the right to sue must be considered, first, in controversies not dependent upon diverse citizenship, and, second, in controversies where the ground of jurisdiction is diverse citizenship.

[54] Jones v. Andrews, 10 Wall. 327, 19 L. Ed. 935; Southern Pac. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; Bluefields S. S. Co. v. State, 184 Fed. 584, 106 C. C. A. 564; Campbell v. Johnson, 167 Fed. 102, 92 C. C. A. 554. It is difficult to reconcile Southern Pac. Co. v. Arlington Heights Co., 191 Fed. 101, 111 C. C. A. 581, with these authorities, especially with Jones v. Andrews. *See "Courts," Dec. Dig. (Key-No.) § 276; Cent. Dig. § 815; "Appearance," Cent. Dig. § 114.*

[55] ST. LOUIS & S. F. R. CO. v. McBRIDE, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; Ingersoll v. Coram, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208; Texas Co. v. Central Fuel Co., 194 Fed. 1, 114 C. C. A. 21; Atchison, T. & S. F. R. Co. v. Gilliland, 193 Fed. 608, 113 C. C. A. 476. *See "Courts," Dec. Dig. (Key-No.) § 276; Cent. Dig. § 815; "Appearance," Cent. Dig. § 114.*

[56] Southern Pac. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; Hagstoz v. Mutual L. I. Co. (C. C.) 179 Fed. 569. *See "Courts," Dec. Dig. (Key-No.) § 276; Cent. Dig. § 815.*

[57] Central Trust Co. v. McGeorge, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98; Horn v. Pere Marquette R. Co. (C. C.) 151 Fed. 626. *See "Courts," Dec. Dig. (Key-No.) § 276; Cent. Dig. § 815.*

Rule When Jurisdiction Not Dependent on Diverse Citizenship

In this case the residence or inhabitancy of the defendant alone confers jurisdiction.[58] It is plain from the language of the act that it was intended to refer only to the residence of citizens of the United States, and hence it does not apply to an alien defendant. If service can be obtained on an alien corporation, and the other requisites of jurisdiction concur, the court can take jurisdiction, though the corporation merely does business at the place where sued, and does not, as in the nature of things it cannot, reside there or become an inhabitant.[59]

On the other hand, when an alien is a plaintiff, then the jurisdiction is necessarily governed by the district of the defendant American citizen or corporation.[60]

As to the meaning of the term "resident or inhabitant," the Supreme Court has settled that. As there were many states which had more than one district, and it would be incongruous to say that a litigant was a citizen of a district, the two words are practically synonymous, and mean the regular home or domicile of the party in question.[61]

A comparatively recent act of Congress requires surety companies to file a power of attorney in any district where

[58] In re Keasbey & Mattison Co., 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402; Cound v. Atchison, T. & S. F. R. Co. (C. C.) 173 Fed. 527; Smith v. Detroit & T. S. L. R. Co. (C. C.) 175 Fed. 506. *See "Courts," Dec. Dig. (Key-No.) § 270; Cent. Dig. § 810.*

[59] BARROW S. S. CO. v. KANE, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; Tierney v. Helvetia Swiss F. I. Co. (C. C.) 163 Fed. 82. *See "Courts," Dec. Dig. (Key-No.) §§ 270, 274; Cent. Dig. §§ 810, 814.*

[60] Galveston, H. & S. A. R. Co. v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248. *See "Courts," Dec. Dig. (Key-No.) §§ 270, 274; Cent. Dig. §§ 810, 814.*

[61] Shaw v. Mining Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; Galveston, H. & S. A. R. Co. v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248; In re Keasbey & Mattison Co., 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402; Freeman v. Surety Co. (C. C.) 116 Fed. 548. *See "Courts," Dec. Dig. (Key-No.) § 270; Cent. Dig. § 810.*

they give a bond, before they can give bonds to the United States or in the United States courts.[62]

The fifth section of this act authorized suits where the bond was given. On the same day (August 13, 1894) an act was passed for the protection of supply men in erecting public works,[63] which was amended February 24, 1905,[64] by requiring suit in such case where the contract with the United States was to be performed and not elsewhere.

Under section 6 of the employer's liability act as amended April 5, 1910, suit may be brought in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action.[65]

When Jurisdiction Dependent on Diverse Citizenship

In this case the suit may be either in the district of the residence of the plaintiff or of the defendant. It cannot, however, be in the residence of the plaintiff unless legal service can be secured on the defendant.[66] And, in the case of a corporation, legal service cannot be obtained upon it, if it does not carry on business in a district, by merely serving one of its officers who happens to be a resident there.[67] Hence, as to nonresident defendants, they can be

[62] 28 Stat. 279 (U. S. Comp. St. 1901, p. 2315).

[63] 28 Stat. 278, c. 280 (U. S. Comp. St. 1901, p. 2523).

[64] 33 Stat. 811, c. 778 (U. S. Comp. St. Supp. 1911, p. 1071); Davidson Bros. Marble Co. v. U. S., 213 U. S. 10, 29 Sup. Ct. 324, 53 L. Ed. 675; U. S. v. Congress Construction Co., 222 U. S. 199, 32 Sup. Ct. 44, 56 L. Ed. 163. *See "Courts," Dec. Dig. (Key-No.) §§ 269, 270; Cent. Dig. §§ 809, 810.*

[65] Act April 22, 1908, c. 149, 35 Stat. 65, as amended by Act April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1324); Newell v. Baltimore & O. R. Co. (C. C.) 181 Fed. 698. *See "Courts," Dec. Dig. (Key-No.) §§ 269, 270; Cent. Dig. §§ 809, 810.*

[66] Barnes v. Telegraph Co. (C. C.) 120 Fed. 550; Kibbler v. St. Louis & S. F. R. Co. (C. C.) 147 Fed. 879; Bruner v. Kansas Moline Plow Co., 168 Fed. 218, 93 C. C. A. 504; Green v. Chicago B. & Q. R. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916. *See "Courts," Dec. Dig. (Key-No.) §§ 272, 273; Cent. Dig. §§ 811, 813.*

[67] Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; Cody Motors Co. v. Warren Motor Car Co. (D.

sued in the district of the plaintiff; but they cannot be sued in a district where neither plaintiff nor defendant resides, though they carry on business there, and though a federal question or other requisite of general jurisdiction may exist; but this exemption from suit may be waived.[68]

SAME—SAME—RULE WHEN LITIGANTS ARE NUMEROUS

105. When the plaintiffs or defendants are numerous, all the plaintiffs must be residents of the district where the suit is brought, if the jurisdiction is based upon the residence of the plaintiff; or all the defendants must be residents of the district where the suit is brought, if the right to sue is based upon the residence of the defendants; but no party not indispensable defeats the jurisdiction.

Following analogies laid down in the cases regulating the general question of jurisdiction between citizens of different states, it is settled that, when the plaintiffs or defendants are numerous, all the plaintiffs must be residents of the district where the suit is brought, if the jurisdiction is based upon the residence of the plaintiffs; or all the defendants must be residents of the district where the suit is brought, if the right to sue is based upon the residence of the defendants.[69]

Following the decisions on the same general subject of jurisdiction, this principle applies only to those who are

C.) 196 Fed. 254. *See "Courts," Dec. Dig. (Key-No.) § 274; Cent. Dig. § 814.*

[68] H. J. Decker, Jr., & Co. v. Southern R. Co. (C. C.) 189 Fed. 224. *See "Courts," Dec. Dig. (Key-No.) § 276; Cent. Dig. § 815.*

[69] SMITH v. LYON, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635; Freeman v. Surety Co. (C. C.) 116 Fed. 548; McAulay v. Moody (C. C.) 185 Fed. 144. *See "Courts," Dec. Dig. (Key-No.) § 273; Cent. Dig. § 813.*

indispensable parties; and even after suit brought, jurisdiction could be sustained by dismissing as to any parties who are not indispensable and who otherwise might defeat jurisdiction.[70]

This provision as to the place where suit must be brought is used in the statute merely in reference to the ordinary civil jurisdiction of the district courts, and hence does not apply to other special classes of jurisdiction. A libel in personam in the district court in admiralty may be maintained in a district other than the residence of the defendant, and the ancient process of the admiralty courts may be resorted to in order to bring the defendant into court.[71]

SAME—SAME—SUITS AGAINST DEFENDANTS OF DIFFERENT DISTRICTS IN SAME STATE, AND SUITS IN REM

106. In suits not of a local nature, when there are two or more defendants in different districts of the same state, the suit may be brought in any district in which any defendant resides, and process will run into the other districts for the purpose of reaching any defendant in the district in which he resides. Similar provision is made as among the different divisions of a district.

In suits of a local nature, where the defendant resides in a different district, in the same state, from that

[70] Ladew v. Tennessee Copper Co. (C. C.) 179 Fed. 245; Id., 218 U. S. 357, 31 Sup. Ct. 81, 54 L. Ed. 1069; Id., 218 U. S. 369, 31 Sup. Ct. 84, 54 L. Ed. 1073. *See "Courts," Dec. Dig. (Key-No.) § 273; Cent. Dig. § 813.*

[71] In re Louisville Underwriters, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991. So as to suits to obtain the issuance of a patent. Lewis Blind Stitch Co. v. Arbetter Felling Machine Co. (C. C.) 181 Fed. 974. *See "Admiralty," Dec. Dig. (Key-No.) § 32; Cent. Dig. §§ 306–312; "Courts," Dec. Dig. (Key-No.) § 273; Cent. Dig. § 813.*

in which the suit is brought, the plaintiff may have original and final process against him directed to the marshal of the district in which he resides.

Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same state, may be brought in either of such districts.

In the case of suits to reach property of absent defendants in any district, certain proceedings in rem are provided for, enforceable by certain prescribed steps in the nature of an order of publication. These are mainly suits to enforce liens, or to remove clouds on titles. There are also special provisions giving receivers extra-territorial powers and authorizing the transfer of cases from one division or district to another under certain circumstances.

Section 52 of the Judicial Code provides for suits not local in their nature. It reads as follows:

"When a state contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the state, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall endorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered

therein, execution may be issued, directed to the marshal of any district in the same state."

Section 53 makes a quite similar provision as to different divisions of the same district.

As to suits of a local nature, section 54 provides as follows:

"In suits of a local nature, where the defendant resides in a different district, in the same state, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides."

As to suits of a local nature, where the property lies in more than one district, section 55 of the Judicial Code provides:

"Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same state, may be brought in the district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted."

The difference between local and transitory actions is well known in the law, and out of the range of the present discussion. The courts have held that an action of trespass for injuries to land is local in its nature, and triable only in the district where the land lies.[72] So with a suit to cancel a mortgage.[73]

[72] Ellenwood v. Marietta Chair Co., 158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913; Kentucky Coal Lands Co. v. Mineral Development Co. (C. C.) 191 Fed. 899. *See "Courts," Dec. Dig. (Key-No.) § 269; Cent. Dig. § 809.*

[73] Cowell v. City Water-Supply Co. (C. C.) 96 Fed. 769, reversed 121 Fed. 53, 57 C. C. A. 393, but not on this point. *See "Courts," Dec. Dig. (Key-No.) § 269; Cent. Dig. § 809.*

Suits to Reach Property of Absent Defendants in the District

Section 57 of the Judicial Code provides as follows:

"When in any suit commenced in any district court of the United States, to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same state, such suit may be brought in either district in said state: provided, how-

ever, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

This act is intended, in the cases covered by it, to regulate the suit by the location of the res; and consequently the district or residence of the plaintiff or defendant has nothing to do with it, though the controversy must be one of which the court has jurisdiction from diversity of citizenship or otherwise. Suit, however, may be brought where the property is, although neither of the parties resides there.[74] The statute covers many different kinds of suits.

Suits to Enforce Any Legal or Equitable Lien upon or Claim to Real or Personal Property in the District

A suit to quiet title comes under this provision.[75] Also a suit for partition of land is treated as a claim to or suit to settle title to real estate.[76] So, also, a suit to reach a fund in the hands of a trustee in the jurisdiction of the court.[77] Suits to foreclose mortgages clearly come under the provision.[78] A suit to enforce a lien of a judgment on

[74] GREELEY v. LOWE, 155 U. S. 58, 15 Sup. Ct. 24, 39 L. Ed. 69; Kentucky Coal Lands Co. v. Mineral Development Co. (C. C.) 191 Fed. 899, 912; Texas Co. v. Central Fuel Co., 194 Fed. 1, 114 C. C. A. 21. *See "Courts," Dec. Dig. (Key-No.) § 269; Cent. Dig. § 809.*

[75] U. S. v. Southern Pac. Co. (C. C.) 63 Fed. 481. *See "Courts," Dec. Dig. (Key-No.) § 269; Cent. Dig. § 809.*

[76] GREELEY v. LOWE, 155 U. S. 58, 15 Sup. Ct. 24, 39 L. Ed. 69. *See "Courts," Dec. Dig. (Key-No.) § 269; Cent. Dig. § 809.*

[77] Goodman v. Niblack, 102 U. S. 556, 26 L. Ed. 229. *See "Courts," Dec. Dig. (Key-No.) § 269; Cent. Dig. § 809.*

[78] Seybert v. Shamokin & Mt. C. Electric Railroad Co. (C. C.) 110 Fed. 810. *See "Courts," Dec. Dig. (Key-No.) § 269; Cent. Dig. § 809.*

property within the district is covered by the statute;[79] so, also, an action of ejectment.[80]

Suits to Remove Any Incumbrance or Lien or Cloud upon the Title to Real or Personal Property

A suit by a creditor of a corporation to set aside a conveyance made by the corporation comes under this provision of the act.[81] A suit to remove a cloud upon a title caused by a tax sale is covered by the act.[82] On the other hand, it is inapplicable to purely personal actions, as to suits to cancel contracts where no lien or claim or title to property is involved, and suits to abate a nuisance.[83] The act is intended to give the right to enforce claims or liens existing before the institution of the suit, and hence it does not cover proceedings by foreign attachment, where the only lien arises from the institution of the suit itself. In the federal courts the proceeding by attachment is a mere incident to a personal suit against the owner, and cannot be brought unless the defendant can be served legally with process.[84] Prior to the jurisdiction acts of 1887–88, process could be served on a defendant if found

[79] De Hierapolis v. Lawrence (C. C.) 99 Fed. 321; Hultberg v. Anderson (C. C.) 170 Fed. 657. *See "Courts," Dec. Dig. (Key-No.) § 269; Cent. Dig. § 809.*

[80] Spencer v. Kansas City Stockyards Co. (C. C.) 56 Fed. 741; Elk Garden Co. v. T. W. Thayer Co. (C. C.) 179 Fed. 556. *See "Courts," Dec. Dig. (Key-No.) § 269; Cent. Dig. § 809.*

[81] Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178. *See "Courts," Dec. Dig. (Key-No.) § 269; Cent. Dig. § 809.*

[82] Dick v. Foraker, 155 U. S. 404, 15 Sup. Ct. 124, 39 L. Ed. 201. *See "Courts," Dec. Dig. (Key-No.) § 269; Cent. Dig. § 809.*

[83] New York Life Ins. Co. v. Bangs, 103 U. S. 435, 26 L. Ed. 580; Ladew v. Tennessee Copper Co., 218 U. S. 357, 31 Sup. Ct. 81, 54 L. Ed. 1069. But it applies where the contracts are a lien or part of a chain of title. Citizens' Savings & Trust Co. v. Illinois C. R. Co., 205 U. S. 46, 27 Sup. Ct. 425, 51 L. Ed. 703. *See "Courts," Dec. Dig. (Key-No.) §§ 269, 274; Cent. Dig. §§ 809, 814.*

[84] Ex parte DES MOINES & M. R. CO., 103 U. S. 794, 26 L. Ed. 461. Big Vein Coal Co. v. Read, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. —. *See "Courts," Dec. Dig. (Key-No.) §§ 269, 271; Cent. Dig. §§ 809, 810.*

in a district, though he did not reside therein; under this last amendment this can no longer be done. On the other hand, even under this last amendment, suit can be brought within the district of the residence of the plaintiff, and accompanied by an attachment, if service can be obtained on the defendant. A suit for the specific performance of a contract has also been held not to come within the act, as a decree in such cases acts in personam, and not on the land and property itself.[85] A suit to restrain the enforcement of a contract of sale of stock by a corporation to certain other defendants as illegal does not come within the act, as there is no question of title or claim in such a case.[86] A suit by heirs against trustees under a will to recover a residue in their hands is not covered by the act.[87]

Procedure under the Act

It is best, even as between two defendants of different districts in the same state, to follow the language of the act and secure an order from the court directing the absent defendant or defendants to appear, plead, answer, or demur by a time certain to be designated, and then to serve that order on the defendants, if practicable, and upon the person in charge of the property.[88] But under sections 52, 54, and 55 of the Judicial Code the original process could be sent into another district in the same state and served. They ought, at least, to cover the case of defendants in different districts in the same state. If, however, original process cannot be served, and only the order of the court under

[85] Municipal Inv. Co. v. Gardiner (C. C.) 62 Fed. 954. But the act would apply if any lien or charge on the land was reserved as part of the contract. Texas Co. v. Central Fuel Oil Co., 194 Fed. 1, 114 C. C. A. 21. *See "Courts," Dec. Dig. (Key-No.) § 269; Cent. Dig. § 809.*

[86] Lengel v. American Smelting & Refining Co. (C. C.) 110 Fed. 19. *See "Courts," Dec. Dig. (Key-No.) §§ 269, 272; Cent. Dig. §§ 809–811.*

[87] Fayerweather v. Ritch (C. C.) 89 Fed. 385. *See "Courts," Dec. Dig. (Key-No.) §§ 269–272; Cent. Dig. §§ 809–811.*

[88] Seybert v. Shamokin & Mt. C. Electric Railroad Co. (C. C.) 110 Fed. 810. *See "Courts," Dec. Dig. (Key-No.) § 344; Cent. Dig. § 917.*

this last act, such order can be sent not only into another district of the same state, but into any other part of the United States, and can be served upon the defendant, if practicable, wherever found.[89] It is therefore necessary, first, to make some effort to find the defendant, and to serve on him the order of the court requiring him to appear and defend himself, and also to serve it upon the person in charge of the property. Only after that is done would it be allowable to resort to the substituted service of publication, and the court will probably require some proof of an attempt to locate the defendant before allowing the substituted service.

The act carries out the theory of procedings in rem under constructive service, and makes it only binding as to the property itself in case there is no appearance. If there is an appearance, on the other hand, the suit becomes an ordinary suit in personam, and could be proceeded with by the plaintiff to a personal judgment.[90]

An important addition to the pre-existing law is embodied in section 56 of the Judicial Code, which confers certain extra-territorial powers on receivers of property situated in more than one district of the same circuit. It will be discussed in another connection.[91]

Section 58 of the Code permits the transfer of cases by consent from one division to another of the same district; and sections 59 and 60 for the proper disposition of cases on the formation of new districts or divisions.

[89] Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178. *See "Courts," Dec. Dig. (Key-No.) § 344; Cent. Dig. § 917.*

[90] Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. *See "Courts," Dec. Dig. (Key-No.) § 344; Cent. Dig. § 917.*

[91] Post, p. 295.

CHAPTER XIII

THE DISTRICT COURT (Continued)—ORIGINAL JURISDICTION (Continued)

107. Same—Jurisdiction as Affected by Assignment.
108. Same—Devices to Confer Jurisdiction.
109. Jurisdiction as Incident to or Derivative from Other Grounds of Jurisdiction.

SAME—JURISDICTION AS AFFECTED BY ASSIGNMENT

107. The assignee of a chose in action arising out of contract cannot sue in the federal courts unless his assignor could have sued there, except in certain cases named in the statute.

In addition to the qualification as to the right to sue in reference to residence of the plaintiff or defendant, there is a further qualification in the statute in reference to the character of the claim to be asserted. One of the clauses of section 24, par. 1, of the Judicial Code, provides:

"No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

The clause applies to any cause of action arising out of a contract and subsequently assigned. For instance, a suit to enforce specific performance of a contract cannot be

brought by the assignee of such a cause of action unless the assignor also could have brought it.[1]

So a suit to enforce the lien of a judgment growing out of a contractual right of action cannot be brought by the assignee unless the judgment creditor also could have brought it.[2]

In the cases cited in the last note, the Supreme Court limits its decision to judgments based upon causes of action growing out of contracts. The principle should apply also to an assignment of a judgment based on a cause of action springing out of tort. It will be seen presently that the statute does not apply to a cause of action for tort, but, when that cause of action is reduced to judgment, under ordinary principles the tort is merged in the judgment, and the judgment creditor then has a cause of action springing out of an implied contract.

The statute applies to suits by the assignee of city warrants not payable to bearer, and also to a purchaser of such warrants at a sale held by an administrator of the original payee under an order of the probate court.[3]

It applies to notes payable to bearer, unless the maker is a corporation. A note to the maker's own order, and indorsed by the maker in blank, is a note payable to bearer, and the holder of such a note is not an assignee in the sense of the statute; the reason being that the cause of

[1] Corbin v. Black Hawk County, 105 U. S. 659, 26 L. Ed. 1136; Plant Inv. Co. v. Jacksonville, T. & W. R. Co., 152 U. S. 71, 14 Sup. Ct. 483, 38 L. Ed. 358. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[2] Walker v. Powers, 104 U. S. 245, 26 L. Ed. 729; Mississippi Mills v. Cohn, 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052. But the judgment creditor may sue if the requisites concur as to him, though judgment was obtained on an assigned cause of action on which he could not have sued. Hultberg v. Anderson (C. C.) 170 Fed. 657. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[3] City of New Orleans v. Benjamin, 153 U. S. 411, 14 Sup. Ct. 905, 38 L. Ed. 764; Glass v. Concordia, 176 U. S. 207, 20 Sup. Ct. 346, 44 L. Ed. 436. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

action by him in such case is necessarily original, as the maker and payee of the note is the same.[4]

But the statute does apply if the note is payable to any payee not the maker, and indorsed by such payee in blank, for there an additional party comes in.[5]

Notes made payable to ——— or order—that is, with the payee's name left blank—are payable to bearer in the sense of the statute.[6]

Coupons are also notes payable to bearer in the sense of the statute, although the bonds from which they are detached are not, for under the principles of the law merchant a coupon is an independent obligation.[7]

Under the statute, however, notes of corporations payable to bearer are excepted from its operations, so that the holder of such a note can sue in the federal courts independently of the citizenship of the original assignor. This principle, however, applies only to corporate notes payable to bearer, and not to corporate notes payable to order and indorsed.[8]

Municipal corporations come within the language of the exception, and the holder of their notes, if payable to bearer, can sue independently of the citizenship of the assignor.[9]

[4] Barling v. Bank, 50 Fed. 260, 1 C. C. A. 510. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[5] State Nat. Bank of Denison v. Eureka Springs Water Co. (C. C.) 174 Fed. 827. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[6] Lyon County, Iowa, v. Keene Five-Cent Sav. Bank, 100 Fed. 337, 40 C. C. A. 391. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[7] Independent School Dist. of Sioux City, Iowa, v. Rew, 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[8] Thomson v. Elton (C. C.) 100 Fed. 145; Lake County v. Dudley, 173 U. S. 243, 19 Sup. Ct. 398, 43 L. Ed. 684. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[9] City of New Orleans v. Quinlan, 173 U. S. 191, 19 Sup. Ct. 329, 43 L. Ed. 664. The fact that the rates are payable to the order of the city treasurer and indorsed by him as such in blank, for the

This same principle applies to an Ohio township, which under their law is a corporation.[10]

Choses in Action

This applies to any right of action springing out of a contract, as stated above; for instance, a suit by the assignee of a mortgage to quiet title.[11]

Under this term is included an assignment of water rents by a water company under a mortgage, with the right to collect the water rents as additional security. The assignee of such right of action cannot sue unless the assignor could have sued.[12]

Causes of action springing out of tort, however, are not included in the choses in action mentioned by the statute, as they apply only to choses in action growing out of contractual rights. Hence the assignee of a cause of action springing from tort can sue in his own name independently of the citizenship of the assignor. Such can be done, for instance, in the case of an action of replevin.[13]

So an assignee of a right of action for trespass to real property can sue independently of the citizenship of his assignor.[14]

mere purpose of giving them currency, does not affect their character as notes payable to bearer. Citizens' Savings Bank v. Newburyport, 169 Fed. 766, 92 C. C. A. 232; Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[10] Loeb v. Columbia Township Trustees, 179 U. S. 472, 21 Sup. Ct. 174, 45 L. Ed. 280. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[11] Farr v. Hobe-Peters Land Co., 188 Fed. 10, 110 C. C. A. 160. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[12] City of Eau Claire v. Payson, 107 Fed. 552, 46 C. C. A. 466; American Waterworks & Guarantee Co. v. Water Co. (C. C.) 115 Fed. 171. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[13] Deshler v. Dodge, 16 How. 622, 14 L. Ed. 1084; Buckingham v. Dake, 112 Fed. 258, 50 C. C. A. 492. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[14] Ambler v. Eppinger, 137 U. S. 480, 11 Sup. Ct. 173, 34 L. Ed. 765; Noyes v. Crawford (C. C.) 133 Fed. 796. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

And the same principle applies to an assigned right of action against a bank for not protesting a draft sent to it by another bank for collection.[15]

Meaning of "Assignee"

The statute applies only to a cause of action existing in some one else and assigned. If the cause of action in its nature is inherent in the suitor, the form which the note evidencing the contract may have taken does not affect his right to sue. For instance, in Holmes v. Goldsmith,[16] a note was made for the accommodation of the payee, and discounted also for his accommodation, he indorsing it to the party who discounted it. In a suit by the holder of the note, it was held that the statute did not apply; that the holder could go against the payee as the party really liable, regardless of the fact that he was in form the indorser or payee, for the reason that, as it was accommodation paper, the payee could not have sued the makers; and therefore, as he had no right of action, there was nothing which he could assign, and hence that the holder of the note could sue, not by virtue of any assignment from him, but by virtue of an original liability of his own.

So, also, where a party gave a draft on a city and the city accepted the draft, in a suit by the payee of the draft against the city as acceptor, it was held that the suit was based upon an original liability of the city to the payee, and not upon any assigned right of action.[17]

Nor does the statute apply to a party claiming under the equitable doctrine of subrogation, as his right of action is an original one and not an assigned one, and this is not af-

[15] Barney v. Globe Bank, Fed. Cas. No. 1,031. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[16] 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[17] City of Superior v. Ripley, 138 U. S. 93, 11 Sup. Ct. 288, 34 L. Ed. 914. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

fected by the fact that an assignment may have been made to evidence the party's right to subrogation.[18]

Nor does the statute defeat the right of the assignee to sue in his own name where the original contract had been modified by a new contract, and the right of action properly arises under the new contract. This is illustrated by American Colortype Co. v. Continental Colortype Co.[19] In this case employés of a corporation had agreed, during their periods of employment, that they would not divulge the secret processes of their employer. The employer transferred these contracts to another company, and the employés agreed to the transfer. In a suit to restrain these employés from entering the employment of a rival corporation, it was held that under this transaction the company was asserting a right of action of its own, and not any assigned right of action from the first corporation.

The statute plainly refers only to an assignee of the right of action, and does not affect the defendant's side of the litigation. Hence, where the holder of a lease assigned it and the assignee took possession, a suit by the lessor against the assignee of the lessee, based on the lease, was held not covered by the statute.[20]

Nor does the statute apply to a party suing on a forthcoming bond in an attachment proceeding by virtue of a state statute which required the sheriff to take such a bond, such bond being for the benefit of parties injured by the attachment, for the right of action in such case is in

[18] City of New Orleans v. Gaines' Adm'r, 138 U. S. 595, 11 Sup. Ct. 428, 34 L. Ed. 1102. *See "Courts," Dec. Dig. (Key-No.) § 512; Cent. Dig. §§ 865–875.*

[19] 188 U. S. 104, 23 Sup. Ct. 265, 47 L. Ed. 404. *See "Courts," Dec. Dig. (Key-No.) § 512; Cent. Dig. §§ 865–875.*

[20] Adams v. Shirk, 105 Fed. 659, 44 C. C. A. 653. *See "Courts," Dec. Dig. (Key-No.) § 512; Cent. Dig. §§ 865–875.*

the party injured, and not by virtue of any assignment from the sheriff.[21]

The statute imposes this restriction on the jurisdiction simply in reference to the original assignor and the last assignee. If jurisdiction can be obtained as far as they are concerned, the citizenship of intermediate assignees or indorsers does not defeat it.[22]

It has been held that the statute imposes this restriction simply so far as the citizenship of the party is concerned, not in reference to any other requisite of jurisdiction; and hence a party who held several assignments which together aggregated $2,000, and in which the assignors had the proper citizenship, was held to be entitled to sue, though the other separate assignors could not have sued, on account of the fact that the separate claims held by them were less than $2,000.[23] The recent case of Waite v. City of Santa Cruz [24] contains expressions in conflict with this, though it discussed another section of the act, and really turned on the point that the transfer was not bona fide.

The requisite as to the citizenship applies simply to the time of institution of suit, not to the time of assignment. If the proper citizenship exists as to the assignor and assignee when suit is brought, the fact that it did not exist when the assignment was made does not affect the question.[25]

[21] Smith v. Packard, 98 Fed. 793, 39 C. C. A. 294. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[22] Emsheimer v. New Orleans, 186 U. S. 33, 22 Sup. Ct. 770, 46 L. Ed. 1042; Farr v. Hobe-Peters Land Co., 188 Fed. 10, 110 C. C. A. 160. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[23] Bowden v. Burnham, 59 Fed. 752, 8 C. C. A. 248; Hartford Fire Ins. Co. v. Erie R. Co. (C. C.) 172 Fed. 899. *See "Courts," Dec. Dig. (Key-No.) §§ 312, 328; Cent. Dig. §§ 865–875.*

[24] 184 U. S. 302, 22 Sup. Ct. 327, 46 L. Ed. 552. *See "Courts," Dec. Dig. (Key-No.) §§ 312, 328; Cent. Dig. §§ 865–875.*

[25] Emsheimer v. New Orleans, 186 U. S. 33, 22 Sup. Ct. 770, 46 L. Ed. 1042; Noyes v. Crawford (C. C.) 133 Fed. 796. Where the claim is transferred back to the original owner by the assignee, the inability of the latter to sue does not affect the right of the original

In instituting such a suit, it is essential that the record must show on its face the requisite citizenship both of the assignor and assignee.[26]

In considering the questions arising under this act, it is important to bear in mind that, while a somewhat similar requirement has been in the federal statutes, since the original judiciary act of 1789, the language of the present act is very different. Hence decisions on old cases must be carefully compared with the acts then in force before they can be safely cited as bearing on the present act.

SAME—DEVICES TO CONFER JURISDICTION

108. Attempts to confer jurisdiction by pretended changes of citizenship or residence, colorable assignments, or improper arrangement of parties are forbidden, and will cause dismissal of the suit by the court ex mero motu, if discovered.

The thirty-seventh section of the Judicial Code provides as follows: "If in any suit commenced in a district court, or removed from a state court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein,

owner. Moore Bros. Glass Co. v. Drevet Mfg. Co. (C. C.) 154 Fed. 737. *See "Courts," Dec. Dig. (Key-No.) §§ 272, 312; Cent. Dig. §§ 865–875.*

[26] Parker v. Ormsby, 141 U. S. 81, 11 Sup. Ct. 912, 35 L. Ed. 654; Smith v. Fifield, 91 Fed. 561, 33 C. C. A. 681. *See "Courts," Dec. Dig. (Key-No.) § 322; Cent. Dig. §§ 876–881.*

but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

This statute is intended to prevent attempts to confer upon the federal courts jurisdiction not given them by law.

Changes of Citizenship

It has sometimes happened that a citizen changes his citizenship for the purpose of acquiring a right to sue in the federal courts. If his change is an actual, bona fide change, and he removes and takes up his domicile in a new place, with the intention of remaining there, the federal court would have jurisdiction, and the single fact that it was his intention to confer jurisdiction would not defeat it. This was held before the enactment of the above statute, and has not been changed by the statute.[27]

Independently of this statute, a change of the citizenship of the litigant, in the federal courts, after the suit has been brought, does not defeat the jurisdiction; nor does the fact that new parties come into the litigation, as jurisdiction is tested by the state of facts at the institution of the suit, and not by subsequent changes.[28]

Transfer of Causes of Action

This statute has come before the courts more frequently on such transfers than where attempts have been made to change the residence of litigants. The principle, however, is the same. If the assignment of the cause of action is an actual, bona fide assignment, leaving no interest whatever in the assignor, then the court would have jurisdiction, subject to the restriction already discussed, as to the cases in

[27] Jones v. League, 18 How. 76, 15 L. Ed. 263; MORRIS v. GILMER, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690. *See "Courts," Dec. Dig. (Key-No.) § 307; Cent. Dig. § 854.*

[28] Phelps v. Oaks, 117 U. S. 236, 6 Sup. Ct. 714, 29 L. Ed. 888; Collins v. City of Ashland (D. C.) 112 Fed. 175. *See "Courts," Dec. Dig. (Key-No.) § 319; Cent. Dig. § 864.*

which an assignee can sue; and that jurisdiction would not be defeated by the motive of the parties in making or accepting the assignment. But where the assignment is colorable—as for instance, where it is made simply for the purpose of collection—then the principle would apply, and the court would refuse jurisdiction. The cases of Williams v. Nottawa Tp.,[29] Farmington v. Pillsbury,[30] and New Providence Tp. v. Halsey [31] illustrate the refusal of the court to take jurisdiction where the assignment was for collection only. But here, too, if the assignment is an actual one, the motive does not affect the question.[32] On the other hand, if the transfer to one nonresident citizen is good, so that he could sue, the subsequent transfer by him to another, though with the intent of giving the other a right to sue, would not invalidate it.[33]

The statute applies to a colorable assignment of a claim intended to be added to a bona fide claim in order to make up the necessary jurisdictional amount.[34]

An interesting question arises in the case of organization of new corporations, as affecting this question. In Lehigh Min. & Mfg. Co. v. Kelly [35] the stockholders of a Vir-

[29] 104 U. S. 209, 26 L. Ed. 719. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[30] 114 U. S. 138, 5 Sup. Ct. 807, 29 L. Ed. 114. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[31] 117 U. S. 336, 6 Sup. Ct. 764, 29 L. Ed. 904. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[32] Lanier v. Nash, 121 U. S. 404, 7 Sup. Ct. 919, 30 L. Ed. 947; Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801; O'Neill v. Wolcott Mining Co., 174 Fed. 527, 98 C. C. A. 309, 27 L. R. A. (N. S.) 200. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[33] Ashley v. Board of Sup'rs of Presque Isle County, 83 Fed. 534, 27 C. C. A. 585. *See "Courts," Dec. Dig. (Key-No.) § 312; Cent. Dig. §§ 865–875.*

[34] Waite v. Santa Cruz, 184 U. S. 302, 22 Sup. Ct. 327, 46 L. Ed. 552; Woodside v. Beckham, 216 U. S. 117, 30 Sup. Ct. 367, 54 L. Ed. 408; ante, p. 284. *See "Courts," Dec. Dig. (Key-No.) § 328; Cent. Dig. §§ 890–896.*

[35] 160 U. S. 327, 16 Sup. Ct. 307, 40 L. Ed. 444. See, also, Miller & Lux v. East Side Canal & Irrigation Co., 211 U. S. 293, 29 Sup. Ct.

ginia corporation organized a Pennsylvania corporation, and conveyed to it the land, which up to that time had stood in the name of the Virginia corporation. The Virginia corporation, however, was still kept in existence, so that, although there was no express agreement by the Pennsylvania corporation to reconvey after the termination of the suit, it was in the power of the stockholders of the Virginia corporation to compel such reconveyance. The court held that, under such circumstances, the jurisdiction could not be sustained, as it was a mere device that came within the prohibition of the statute. On the other hand, in Irvine Co. v. Bond [86] an individual organized a corporation, appointed as a board of directors parties whom he could control, and conveyed to them just enough stock to qualify them, and then conveyed to this new corporation the property as to which suit was to be brought. There was nothing to show any intent to convey the fruits of litigation back to the individual, though he controlled all but a few shares of the corporate stock, and practically controlled the board of directors. The court held in this case that the transfer gave jurisdiction to the new corporation to sue, despite the above Supreme Court decision.

Colorable Assertion of Federal Question

The statute also applies where a federal question has been raised for the mere purpose of conferring jurisdiction on the court—especially when, after the pleadings are made up, it is patent that the federal question is immaterial, and that the case will turn upon other questions.[87]

111, 53 L. Ed. 189; Southern Realty Inv. Co. v. Walker, 211 U. S. 603, 29 Sup. Ct. 211, 53 L. Ed. 346. *See "Courts," Dec. Dig. (Key-No.) § 316; Cent. Dig. § 862.*

[86] (C. C.) 74 Fed. 849. See, also, Slaughter v. Mallet Land & Cattle Co., 141 Fed. 282, 72 C. C. A. 430; Acord v. Western Pocahontas Corporation (C. C.) 156 Fed. 989; Id., 174 Fed. 1019, 98 C. C. A. 625. *See "Courts," Dec. Dig. (Key-No.) § 316; Cent. Dig. § 862.*

[87] Robinson v. Anderson, 121 U. S. 522, 7 Sup. Ct. 1011, 30 L. Ed. 1021; Excelsior Wooden Pipe Co. v. Bridge Co., 185 U. S 282, 22

Improper Joinder of Parties

The statute may also be violated by an improper joinder of parties for the express purpose of conferring jurisdiction.[38] For instance, a suit by a stockholder against a corporation and the officers of the corporation, who refuse to assert a corporate right—the officers being joined merely on the allegation that they had been requested to assert the right and had refused—contravenes the statute.[39]

In equity cases this is also covered by equity rule 27, which provides as follows: "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort."

However, the mere fact that the trustees are in sympathy with the action brought by the stockholder would

Sup. Ct. 681, 46 L. Ed. 910. As somewhat analogous, see Farrell v. O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101. *See "Courts," Dec. Dig. (Key-No.) § 284; Cent. Dig. §§ 818–826.*

[38] Stephens v. Smatt (C. C.) 172 Fed. 466; Williams v. City Bank & Trust Co., 186 Fed. 419, 108 C. C. A. 341. The dropping of a plaintiff from a bill because he would defeat the jurisdiction does not prove collusion. Mathieson v. Craven (C. C.) 164 Fed. 471. *See "Courts," Dec. Dig. (Key-No.) § 316; Cent. Dig. § 862.*

[39] City of Detroit v. Dean, 106 U. S. 537, 1 Sup. Ct. 560, 27 L. Ed. 300. *See "Courts," Dec. Dig. (Key-No.) §§ 314, 316; Cent. Dig. §§ 860, 862.*

not defeat the jurisdiction, nor bring them within this rule, if their refusal to bring suit in the name of the corporation was actually bona fide, and based on grounds which they thought sufficient.[40]

Method of Attacking Jurisdiction under This Section

Under the express language of the act, lack of jurisdiction need not be raised by the pleadings, though it would be proper to do so. It may be raised at any time, and the court, of it own motion, may raise it.[41] The statute, however, requires that the want of jurisdiction on this ground must "appear to the satisfaction of said court." Under this clause the court discourages attempts to raise the question when it has not been raised by the pleadings, and the case has progressed far on the merits. In such case the party raising it has the burden of proof to show clearly that the statute has been violated.[42]

JURISDICTION AS INCIDENT TO OR DERIVATIVE FROM OTHER GROUNDS OF JURISDICTION

109. The federal courts have jurisdiction in a large class of matters on the ground that the same is an incident or sequel to jurisdiction already acquired under some of the preceding heads, although they would

[40] Bowdoin College v. Merritt (C. C.) 63 Fed. 213. See, also, on this general subject, Illinois Cent. R. Co. v. Adams, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410; City of Quincy v. Steel, 120 U. S. 241, 7 Sup. Ct. 520, 30 L. Ed. 624; Simpson v. Union Stock Yards Co. (C. C.) 110 Fed. 799. *See "Courts," Dec. Dig. (Key-No.) §§ 314, 316; Cent. Dig. §§ 860, 862.*

[41] MORRIS v. GILMER, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690; Lake County v. Dudley, 173 U. S. 243, 19 Sup. Ct. 398, 43 L. Ed. 684. *See "Courts," Dec. Dig. (Key-No.) § 277; Cent. Dig. § 818.*

[42] Deputron v. Young, 134 U. S. 241, 10 Sup. Ct. 539, 33 L. Ed. 923; Collins v. Ashland (D. C.) 112 Fed. 175; Gaddie v. Mann (C. C.) 147 Fed. 955. *See "Courts," Dec. Dig. (Key-No.) § 324; Cent. Dig. §§ 882–884.*

not have jurisdiction of such matters as an original proposition. In other words, in these ancillary or incidental proceedings the question of citizenship or amount involved is immaterial, and the jurisdiction is conferred by reason of the principle that it is necessary, in order to carry out the objects of the main case and give complete relief, or to settle all questions necessarily dependent upon the main case.[43]

A common branch of this ancillary jurisdiction is where some additional suit is brought or proceeding instituted to carry out the object of the main litigation, or to realize its fruits. For instance, in Stewart v. Dunham,[44] which was a creditors' bill to set aside an alleged fraudulent conveyance, it was held that the admission of additional creditors as co-complainants did not defeat the jurisdiction, but that the court had power to consider their claims independent of their citizenship or the amount involved.

In Gumbel v. Pitkin,[45] attachments had issued from a United States court, and property had been seized thereunder. Then a creditor in a state court issued an attachment, and placed it in the hands of the sheriff, and had notice of this attachment served upon the marshal, but without any seizure, as that could not have been accomplished. He

[43] Compton v. Jesup, 68 Fed. 263, 15 C. C. A. 397; Id., 167 U. S. 1, 17 Sup. Ct. 795, 42 L. Ed. 55 (the questions discussed in the Supreme Court opinion are not in point on this special question); Peck v. Elliott, 79 Fed. 10, 24 C. C. A. 425, 38 L. R. A. 616; Hill v. Kuhlman, 87 Fed. 498, 31 C. C. A. 87; Brun v. Mann, 151 Fed. 145, 80 C. C. 513, 12 L. R. A. (N. S.) 154; Hobbs Mfg. Co. v. Gooding (C. C.) 164 Fed. 91. *See "Courts," Dec. Dig. (Key-No.) § 264; Cent. Dig. § 801.*

[44] 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329. *See "Courts," Dec. Dig. (Key-No.) § 264; Cent. Dig. § 801.*

[45] 124 U. S. 131, 8 Sup. Ct. 379, 31 L. Ed. 374. See, also, as to suits to enforce an attachment lien, Hatcher v. Hendrie & Bolthoff Mfg. & Supply Co., 133 Fed. 267, 68 C. C. A. 19. *See "Courts," Dec. Dig. (Key-No.) §§ 264, 498; Cent. Dig. §§ 801, 1387.*

then asked leave to intervene in the federal court case, and he was allowed to do so (though he was not a party to the first litigation), on the ground that his proceeding was a dependent bill; that he was obliged to come into the federal court, because he could really go nowhere else; and that the court having jurisdiction of the main case had jurisdiction to pass upon all questions incidentally involved. From this it appears that a bill may be ancillary or dependent though the parties may be different from the parties in the first suit.

In Root v. Woolworth [46] a decree had been entered settling the title to land, and a conveyance by a commissioner of court had been made in pursuance of that decree. The defendant in the first case disregarded the decree, and still asserted title to the land. It was held that a bill would lie by an assignee of the first plaintiff to enjoin the defendant from such assertion of title, and that such bill was supplemental and ancillary.

In White v. Ewing [47] the assets of a corporation were being administered by a court. The receiver brought a number of claims against different debtors to the corporation all in one proceeding, many of whom owed less than two thousand dollars. There was no demurrer as to the joinder of all of these defendants in one proceeding. It was held that the court had jurisdiction of these proceedings, as ancillary to the main suit, whether or not it had jurisdiction of them as independent proceedings.

[46] 150 U. S. 401, 14 Sup. Ct. 136, 37 L. Ed. 1123. But not a bill to distribute the proceeds of a sale of lands recovered from the United States among the parties entitled, in pursuance of a private agreement of sale among them. Stillman v. Combe, 197 U. S. 436, 25 Sup. Ct. 480, 49 L. Ed. 822. *See "Courts," Dec. Dig. (Key-No.) § 264; Cent. Dig. § 801.*

[47] 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67. See, as analogous, Gundy v. Armstrong, 133 Fed. 417, 66 C. C. A. 627; Brown v. Allebach (C. C.) 156 Fed. 697. *See "Courts," Dec. Dig. (Key-No.) § 264; Cent. Dig. § 801.*

In New Orleans v. Fisher [48] a judgment creditor of New Orleans filed a bill against the school board of that city to force an accounting of the collections of school taxes. Jurisdiction was sustained as ancillary to the enforcement of the main judgment which had been obtained in the United States court, though the school board was not a party to the first litigation.

In Phelps v. Mutual Reserve Fund Life Ass'n [49] there was a proceeding in a state court against a nonresident insurance company, against whom judgment had been obtained, which looked to the appointment of a receiver and impounding premiums due it. This suit was removed into the federal court, where it was held that it was ancillary to the main suit, and sustainable on that ground.

Under this principle the court, having obtained jurisdiction in the main cause, has the right to consider any incidental questions arising thereunder, or brought to its attention by petition or otherwise, which are naturally connected with the main litigation, as in this way complete and speedy justice can best be done.

In Blake v. Pine Mountain Iron & Coal Company [50] it was decided that, when property was in charge of a receiver of a federal court, it could consider the claims of all parties thereby affected or interested in the property, regardless of the grounds of jurisdiction in the main case, as this was necessarily incidental to the main case.

In Central Trust Co. v. Benedict [51] a trust company held

[48] 180 U. S. 185, 21 Sup. Ct. 347, 45 L. Ed. 485. See, also, Preston v. Calloway, 183 Fed. 19, 105 C. C. A. 311; Brown v. Morgan (C. C.) 163 Fed. 395. *See "Courts," Dec. Dig. (Key-No.) § 264; Cent. Dig. § 801.*

[49] 112 Fed. 453, 50 C. C. A. 339, 61 L. R. A. 717; Mutual Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987. *See "Courts," Dec. Dig. (Key-No.) § 264; Cent. Dig. § 801.*

[50] 76 Fed. 624, 22 C. C. A. 430. *See "Courts," Dec. Dig. (Key-No.) §§ 264, 501; Cent. Dig. §§ 801, 1409.*

[51] 78 Fed. 198, 24 C. C. A. 56. *See "Courts," Dec. Dig. (Key-No.) § 264; Cent. Dig. § 801.*

a certain fund as custodian. In a foreclosure receivership suit it was held that the court could consider the petition of the trustee for compensation out of that fund as an incident to the main cause.

In Central Trust Co. v. Bridges [52] a suit for foreclosure was pending. The court permitted parties who claimed mechanics' liens to come in by petition, and decided that it had the right to consider their claims as ancillary to the main litigation.

In Jenks v. Brewster [53] a suit to construe and enforce a decree of a federal court was held to be ancillary to the main suit.

Under this principle the court may protect property under its control from proceedings by adverse claimants. It has been seen from the above cases that such adverse claimants have the right to come into the federal court for relief. The court, however, could not only give them the right to intervene, but can compel them to do so if they attempt in any way to interfere with the property under its control, and this applies to a claim for taxes by a state against the property.[54]

The court, under this principle, can take jurisdiction of a suit on an attachment bond given in the main proceeding. Independent of this principle of ancillary process, such a suit would naturally involve a federal question; but, if this principle alone could be applied to sustain jurisdiction, then the amount involved would have to be three thousand dollars. If, however, such proceedings are sustainable on the

[52] 57 Fed. 753, 6 C. C. A. 539. *See "Courts," Dec. Dig. (Key-No.) § 264; Cent. Dig. § 801.*

[53] (C. C.) 96 Fed. 625. *See "Courts," Dec. Dig. (Key-No.) § 264; Cent. Dig. § 801.*

[54] Memphis Sav. Bank v. Houchens, 115 Fed. 96, 52 C. C. A. 176; Ex parte Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689. *See "Courts," Dec. Dig. (Key-No.) §§ 264, 500; Cent. Dig. §§ 801, 1407, 1408.*

ground that they are ancillary, these other requisites of jurisdiction which apply to the main suit do not apply.[55]

One of the most common and useful grounds of ancillary jurisdiction in the federal courts is the case where property which extends into more than one district, or even into more than one state, comes into the possession of the federal court for purposes of administration. The best known instances of these proceedings are those of railroads whose lines run through different states or districts. A great advantage of the federal courts, which has led to these suits being in a great majority of cases brought there, is this very fact—that, when one federal court takes jurisdiction of such a proceeding, ancillary proceedings can be filed in every other district or state where the defendant may have property. In such case one district is treated as the main district. The orders and various steps in the proceeding are taken in that district, and the judges in the other districts do little more than merely register the decrees of the first district. It is a well-settled practice in such case that the claims against the defendant should be asserted in the main case, and not in the ancillary district.[56]

This matter has been greatly facilitated in the Judicial Code by adding a section (section 56) giving to a receiver appointed and qualifying in one district jurisdiction over all property involved in the suit and situated in the circuit, on filing in the other district courts a copy of the bill on which he was appointed and the order of appointment. Prior to this provision a receiver had no extra-territorial powers.[57]

[55] **Files v. Davis** (C. C.) 118 Fed. 465. *See "Courts," Dec. Dig. (Key-No.) § 264; Cent. Dig. § 801.*

[56] **Central Trust Co. v. East Tennessee, V. & G. R. Co.** (C. C.) 30 Fed. 895; **Central Trust Co. of New York v. United States Flour Milling Co.** (C. C.) 112 Fed. 371. *See "Courts," Dec. Dig. (Key-No.) § 263; Cent. Dig. §§ 799, 800.*

[57] **Strout v. United Shoe Machinery Co.** (D. C.) 195 Fed. 313. *See "Courts," Dec. Dig. (Key-No.) § 264; Cent. Dig. § 801.*

It is largely a question of convenience which should be selected as the main district in the first instance. As a rule the best district to select is the district of the defendant's principal office; but where suit is first brought in another district, and the defendant company has appeared, or legal service has been obtained upon it, that may be treated as the main district.[58]

Mandamus Proceedings

The writ of mandamus in the federal courts is not an original proceeding at law or in equity, and therefore the courts have no jurisdiction in proceedings of that nature as original proceedings.[59]

In these courts mandamus is a dependent or ancillary proceeding, and can be used only when the court has already acquired jurisdiction in the main case on some well-established ground of federal jurisdiction. But its use in this way in the nature of a writ of execution, or a writ to effectuate the relief granted in the main suit, is quite common. For instance, in Labette County Com'rs v. U. S.,[60] where judgment had been obtained in a federal court against a township, a mandamus proceeding against the officers charged with the duty of satisfying such judgment was sustained to enforce the judgment, on the ground that it was such an ancillary proceeding, though the parties defendant to the writ were not parties to the original suit.

[58] Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C.) 72 Fed. 26. In this important suit the judges of the different circuits met, conferred, and agreed upon a uniform decree. *See "Courts," Dec. Dig. (Key-No.) § 268; Cent. Dig. §§ 806–812.*

[59] ROSENBAUM v. BAUER, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743; State of Indiana v. Lake Erie & W. R. Co. (C. C.) 85 Fed. 1; In re Winn, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873. Under the tenth section of the interstate commerce act (Act March 2, 1889, c. 382, 25 Stat. 855 [U. S. Comp. St. 1901, p. 3172]), it is authorized as an independent proceeding. Baltimore & O. R. Co. v. United States ex rel. Pitcairn Coal Co., 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292. *See "Courts," Dec. Dig. (Key-No.) § 265; Cent. Dig. § 803.*

[60] 112 U. S. 217, 5 Sup. Ct. 108, 28 L. Ed. 698. *See "Courts," Dec. Dig. (Key-No.) §§ 264, 265; Cent. Dig. §§ 801, 803.*

In Hair v. Burnell [61] the judgment had been obtained in a federal court against a stockholder of a corporation, and his stock had been garnished through the corporation, and sold under execution. The court sustained a mandamus by the purchaser of the stock against the corporation to compel its transfer on the books to the purchaser.

In Board of Liquidation of City of New Orleans v. U. S.[62] a proceeding by mandamus against the board of liquidation to enforce a federal judgment against the city was sustained, though the board itself, as a corporation, was not a party to the original suit.

Scire Facias

The federal courts have jurisdiction of a scire facias not only by virtue of section 716, but also because this, too, is considered an ancillary or dependent proceeding. For instance, in Pullman's Palace Car Co. v. Washburn [63] such a proceeding was sustained, which was instituted to enforce liability for costs obtained on a judgment in the federal court.

So, too, in Lafayette County, Mo., v. Wonderly [64] a scire facias to revive a personal judgment of the federal courts was sustained as an ancillary proceeding.

A common class of ancillary proceedings is those instituted for the purpose of seeking protection against the original suit on grounds which could not have been raised in such suit. The best-known class of this jurisdiction is bills to enjoin judgments obtained in federal courts. The only

[61] (C. C.) 106 Fed. 280. *See "Courts," Dec. Dig. (Key-No) §§ 264, 265; Cent. Dig. §§ 801, 803.*

[62] 108 Fed. 689, 47 C. C. A. 587. *See "Courts," Dec. Dig. (Key-No.) §§ 264, 265; Cent. Dig. §§ 801, 803.*

[63] (C. C.) 66 Fed. 790; Washburn v. Pullman's Palace-Car Co., 76 Fed. 1005, 21 C. C. A. 598. *See "Courts," Dec. Dig. (Key-No.) § 264; Cent. Dig. § 801.*

[64] 92 Fed. 313, 34 C. C. A. 360; Collin County Nat. Bank of McKinney, Tex., v. Hughes, 152 Fed. 414, 81 C. C. A. 556; Id., 155 Fed. 389, 83 C. C. A. 661; Egan v. Chicago G. W. R. Co. (C. C.) 163 Fed. 344. *See "Courts," Dec. Dig. (Key-No.) § 264; Cent. Dig. § 801.*

remedy against such judgments is in the federal courts, and hence such bills are sustainable, and are considered ancillary.[65]

The same principle applies to bills to enjoin suits which have not proceeded to judgment. The federal courts have jurisdiction of such proceedings—in fact, they are the only courts which would have such jurisdiction, as state courts cannot enjoin proceedings in federal courts. For instance, in Bradshaw v. Miners' Bank [66] a bill to enjoin the prosecution of a creditors' suit was held ancillary to the main suit, and sustainable on that ground.

In Virginia-Carolina Chemical Co. v. Home Ins. Co.[67] the insured had brought separate actions against many insurance companies, who had separate policies which provided that the companies should be liable only for their proportionate share of the loss. It was held that a bill to adjust the equities of the insurance companies as among themselves and against the insured, and to enjoin the prosecution of the common-law suits, would lie as ancillary to the main suit.

The same principle applies to suits to set aside decrees or to construe them.[68]

In Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.[69] the court, in defining these ancillary suits, is careful to call attention to the fact that they may be ancillary in the federal courts, though, under the common-law rules of proce-

[65] Jones v. Andrews, 10 Wall. 327, 19 L. Ed. 935; Loy v. Alston, 172 Fed. 90, 96 C. C. A. 578. *See "Courts," Dec. Dig. (Key-No.) § 264; Cent. Dig. § 801.*

[66] 81 Fed. 902, 26 C. C. A. 673. *See "Courts," Dec. Dig. (Key-No.) § 264; Cent. Dig. § 801.*

[67] 113 Fed. 1, 51 C. C. A. 21. *See "Courts," Dec. Dig. (Key-No.) § 264; Cent. Dig. § 801.*

[68] Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co., 2 Wall. 609, 17 L. Ed. 886; Pacific R. Co. v. Missouri Pac. R. Co., 111 U. S. 505, 4 Sup. Ct. 583, 28 L. Ed. 498. *See "Courts," Dec. Dig. (Key-No.) § 264; Cent. Dig. § 801.*

[69] 2 Wall. 609, 17 L. Ed. 886. *See "Courts," Dec. Dig. (Key-No.) § 264; Cent. Dig. § 801.*

dure, they would be treated as original. It says: "But we think that the question is not whether the proceeding is supplemental and ancillary, or is independent and original, in the sense of the rules of equity pleading, but whether it is supplemental and ancillary, or is to be considered entirely new and original, in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the federal courts from that of the state courts. No one, for instance, would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law is an original bill, in the chancery sense of the word. Yet this court has decided many times that, when a bill is filed in the circuit court to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law—so much so that the court will proceed in the injunction suit without actual service of subpœna on the defendant, and though he be a citizen of another state, if he were a party to the judgment at law. The case before us is analogous. An unjust advantage has been obtained by one party over another by a perversion and abuse of the orders of the court, and the party injured comes now to the same court to have this abuse corrected, and to carry into effect the real intention and decree of the court, and that while the property which is the subject of contest is still within the control of the court, and subject to its order."

Cross-Bills

Another common procedure sustainable under this principle of ancillary jurisdiction is the case of cross-bills, which are treated as ancillary, and therefore within the jurisdiction of the court, when they relate to the same subject-matter as the original or main litigation.[70]

[70] Morgan's L. & T. R. & S. S. Co. v. Texas Cent. R. Co., 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625; Everett v. Independent School Dist. of Rock Rapids (C. C.) 102 Fed. 529; Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258, 31 Sup. Ct. 11, 54 L. Ed. 1032; Fed-

Under the inherent power of the court to prevent its process from being used, either fraudulently or otherwise, in such manner as to cause oppression, or to deprive any one of his rights, proceedings to settle adverse claims to property, either by asserting title or by questioning the proceedings in the main case, are sustainable as ancillary and dependent.

In Krippendorf v. Hyde [71] the marshal had attached the property of a third party as belonging to the defendant. This third party was allowed to intervene for the purpose of securing relief, and this proceeding was treated as ancillary, and justified by the inherent power of the court to prevent its process from being oppressively used.

eral Mining & Smelting Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (C. C.) 187 Fed. 474. *See "Courts," Dec. Dig. (Key-No.) § 264; Cent. Dig. § 801.*

[71] 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Broadis v. Broadis (C. C.) 86 Fed. 951. *See "Courts," Dec. Dig. (Key-No.) § 264; Cent. Dig. § 801.*

CHAPTER XIV

THE DISTRICT COURT (Continued)—JURISDICTION BY REMOVAL

110. Removals from State Courts—Purpose of Such Jurisdiction.
111. Nature of the Right—How Far Waivable.
112. Scope of the Jurisdiction.
113. Federal Questions.
114. Suits by the United States.

REMOVALS FROM STATE COURTS—PURPOSE OF SUCH JURISDICTION

110. The purpose of the federal jurisdiction by removal from state courts in certain cases, principally of diverse citizenship and federal questions, is that in the former local influence and prejudice may be avoided; and in the latter the right to have the federal courts pass upon such questions is essential to the proper administration of federal laws.[1]

The class of jurisdiction of the district courts by removal from other courts is practically as extensive as its jurisdiction over cases originally instituted there.

In discussing the original jurisdiction, it has been seen that these cases may originally be brought in the federal court. Where the parties asserting a federal right or residing outside of a state are plaintiffs, this provision is sufficient for their protection; but it was necessary to provide, also, for those cases where the nonresident was a defendant, or where the federal question asserted in a state court could be removed by the party against whom it was asserted. Hence the provision allowing the removal of cases from state courts into the federal courts. The con-

[1] Federalist, No. 80.

stitutional right of Congress to provide not only for giving the federal courts original cognizance of such cases, but also for giving the right of removal, is settled.[2]

The provisions for removal of cases, however, elaborate as they are, fall far short of the constitutional powers of Congress. There are many cases involving federal questions, or involving controversies between citizens of different states, which cannot be removed into the federal courts. It is true, as will be seen hereafter, that in some of these cases a writ of error can be taken from the state court of last resort to the Supreme Court of the United States, where a federal question is involved, but this does not by any means exhaust the possibilities of such cases. Where a right arising under the Constitution and laws of the United States is asserted in a state court, and decided in favor of the right in the state court, such writs of error do not lie; and there are many questions where the construction of the Constitution or an act of Congress may be involved in a state court over which no federal court has any supervision.

For instance, it will appear in the sequel that cases cannot be removed on the ground of a federal question being involved unless that fact appears from the plaintiff's own pleading, and cannot be taken by writ of error from a state court to the United States Supreme Court unless an adverse decision to the federal right is rendered. In addition the right of removal is limited by the amount involved and by the character of the proceeding.

[2] **Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648.** *See "Removal of Causes," Dec. Dig. (Key-No.) § 2; Cent. Dig. § 3.*

NATURE OF THE RIGHT—HOW FAR WAIVABLE

111. This right to remove cases is purely statutory, and, as in similar cases of original suits, cannot be conferred by consent, but the parties must show compliance with the statute and the jurisdictional facts.[3]

But while consent cannot give this right, consent can waive it in special cases, and not only consent, but such acts equivalent to consent as may be considered a waiver, and as would equitably estop a party from attempting to remove his case.[4]

In West Virginia v. King [5] a defendant applied to a state court for removal of a case, and the court refused his petition. He thereafter asked for an amendment of his pleadings, which was allowed by the court, and applied to the state court of appeals for a writ of prohibition designed to give the case in the state court a certain shape to his advantage. It was held that this action of his was a waiver of his right to remove.

It is difficult to understand, however, how, after a petition has been filed and refused, and proper exceptions taken, any steps in the state court looking to setting up the best defense thereto can be considered a waiver. The Supreme Court has frequently decided that, after a petition to remove has been refused, the party may go on and resist

[3] Kingsbury v. Kingsbury, Fed. Cas. No. 7,817; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867. *See "Removal of Causes," Dec. Dig. (Key-No.) § 16; Cent. Dig. § 6.*

[4] Hanover Nat. Bank v. Smith, Fed. Cas. No. 6,035; Case v. Olney (C. C.) 106 Fed. 433. Compare Atlanta, K. & N. Ry. Co. v. Southern R. Co., 131 Fed. 657, 66 C. C. A. 601. *See "Removal of Causes," Dec. Dig. (Key-No.) § 17; Cent. Dig. § 10; "Courts," Cent. Dig. § 150.*

[5] (C. C.) 112 Fed. 369. *See "Removal of Causes," Dec. Dig. (Key-No.) § 17; Cent. Dig. § 10; "Courts," Cent. Dig. § 150.*

the case in the state court, or prosecute it in the federal court and disregard the state court, or do both.[6]

But it is not a waiver of the right to remove, where a nonresident defendant enters a special appearance in a state court, and asks to set aside a judgment against him for want of service, and takes a bill of exceptions to the refusal of the court to do so.[7]

Nor is it a waiver of the right to remove to give an attachment bond in the state court in order to release property from attachment.[8]

But if the petitioner invokes affirmative relief in the state court, instead of simply standing on his defense, he waives his right of removal, as he cannot invoke a jurisdiction and afterwards deny it.[9]

Although a defendant in a particular case can waive his right to remove, either by express consent or by acts equivalent thereto, he cannot agree generally not to remove cases to the federal courts, nor can a state statute require such an agreement, as it would be in fraud of the jurisdiction of the courts. This question has come up frequently in cases where state legislatures attempt to impose on foreign corporations, as a condition of allowing them to do business in the state, an agreement that they would not remove their cases to the federal courts.

[6] Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 29 Sup. Ct. 430, 53 L. Ed. 765; Avent v. Deep River Lumber Co. (C. C.) 174 Fed. 298. *See "Removal of Causes," Dec. Dig. (Key-No.) § 17; Cent. Dig. § 10; "Courts," Cent. Dig. § 150.*

[7] Baumgardner v. Bono Fertilizer Co. (C. C.) 58 Fed. 1. *See "Removal of Causes," Dec. Dig. (Key-No.) § 17; Cent. Dig. § 10; "Courts," Cent. Dig. § 150.*

[8] Purdy v. Wallace, Muller & Co. (C. C.) 81 Fed. 513. *See "Removal of Causes," Dec. Dig. (Key-No.) § 17; Cent. Dig. § 10; "Courts," Cent. Dig. § 150.*

[9] Merchants' Heat & Light Co. v. James B. Clow & Sons, 204 U. S. 286, 27 Sup. Ct. 285, 51 L. Ed. 488; Texas & P. R. Co. v. Eastin & Knox, 214 U. S. 153, 29 Sup. Ct. 564, 53 L. Ed. 946. *See "Removal of Causes," Dec. Dig. (Key-No.) § 17; Cent. Dig. § 10; "Courts," Cent. Dig. § 150.*

In Doyle v. Continental Ins. Co.[10] there are expressions in the opinion which imply that a state legislature could direct its officers to revoke a license granted to a foreign corporation if a foreign corporation removed a case, on the ground that the state, having the right to refuse the privilege of doing business entirely to a corporation, could not have its action or instructions to its own officers inquired into.

But in the later case of Barron v. Burnside[11] the Supreme Court explained that the only question decided in the above case was that an injunction would not lie against a state officer to prevent him from revoking such a license, and that a provision in a state statute requiring such an agreement from a foreign corporation was absolutely void.[12]

But while state statutes cannot require an agreement not to remove as a condition of doing business in the state, they may provide that a foreign corporation which removes a case shall forfeit any right to continue business in the state, provided that no property rights have vested, and provided further that other constitutional provisions are not violated by the statute.[13]

On the same principle, a state cannot limit to its own courts the enforcement of a controversy of which Congress has given the federal courts jurisdiction. If the contro-

[10] 94 U. S. 535, 24 L. Ed. 148. *See "Removal of Causes," Dec. Dig. (Key-No.) § 3; Cent. Dig. §§ 4, 5.*

[11] 121 U. S. 186, 7 Sup. Ct. 931, 30 L. Ed. 915. *See "Removal of Causes," Dec. Dig. (Key-No.) § 3; Cent. Dig. §§ 4, 5; "Corporations," Cent. Dig. § 2506.*

[12] Southern Pac. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942. *See "Removal of Causes," Dec. Dig. (Key-No.) § 3; Cent. Dig. §§ 4, 5.*

[13] Security Mut. Life Ins. Co. v. Prewitt, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013, 6 Ann. Cas. 317; Chicago, R. I. & P. R. Co. v. Swanger (C. C.) 157 Fed. 783; Herndon v. Chicago, R. I. & P. R. Co., 218 U. S. 135, 50 Sup. Ct. 633, 54 L. Ed. 970. *See "Corporations," Dec. Dig. (Key-No.) § 651; Cent. Dig. § 2506.*

versy is such as can be constitutionally conferred on the federal courts by Congress, and if it has been so conferred, then the act of the state in giving its own courts jurisdiction of itself gives the federal courts jurisdiction over it. For instance, in Lincoln Co. v. Luning [14] a state statute gave the right to sue a county simply in the state courts. It was held that a nonresident could bring a suit against the county in the federal courts.

In George T. Smith Middlings Purifier Co. v. McGroarty [15] the state statute limited the procedure to its probate courts. The Supreme Court, considering that the question involved was not a mere probate proceeding, but a controversy between citizens of different states, held that it could be originally brought in the federal courts.

The above cases were both cases of original suits in the federal courts. Clark v. Bever [16] was a case where a decedent's estate was being settled in a probate proceeding, but there was a controversy between citizens of different states as to their rights in these probate proceedings. The court held that such a controversy could be removed into the federal court.

In Kirby v. Chicago & N. W. Ry. Co.[17] a condemnation proceeding in a court was held to be removable into the federal courts.

[14] 133 U. S. 529, 10 Sup. Ct. 363, 33 L. Ed. 766. *See "Courts," Dec. Dig. (Key-No.) § 259; Cent. Dig. §§ 795, 796.*

[15] 136 U. S. 237, 10 Sup. Ct. 1017, 34 L. Ed. 346. *See "Courts," Dec. Dig. (Key-No.) § 259; Cent. Dig. §§ 795, 796.*

[16] 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88. *See "Removal of Causes," Dec. Dig. (Key-No.) § 3; Cent. Dig. §§ 4, 5.*

[17] (C. C.) 106 Fed. 551. See, also, ante, p. 222; Fishblatt v. Atlantic City (C. C.) 174 Fed. 196; Kaw Valley Drainage Dist. of Wyandotte County, Kan., v. Metropolitan Water Co., 186 Fed. 315, 108 C. C. A. 393; Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462. *See "Removal of Causes," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 11–20.*

SCOPE OF THE JURISDICTION

112. The jurisdiction of the district courts applies, generally speaking, to such cases as could be originally brought in the district court, as set out ante, p. 218, and may be summarized as follows:

(a) Federal questions.
(b) Suits by the United States, or its officers.
(c) Suits or separable controversies between citizens of different states.
(d) Suits between citizens and aliens.
(e) Suits under grants of land from different states.
(f) Suits from denial of civil rights.
(g) Suits and prosecutions against revenue officers, etc.
(h) Suits by aliens against civil officers of the United States.

The first section of this act, as carried into section 24 of the Judicial Code, has already been quoted in full in connection with the original jurisdiction of the district court.[18] The second and third sections, as now embodied in section 28 of the Judicial Code, regulate the removal from the state courts of the vast majority of instances where removal is authorized. The first sentence of this section provides for removal, under certain circumstances, of cases arising under the Constitution and laws of the United States, or federal questions, as they are commonly termed. This provision is based upon the character of the controversy, and is independent of citizenship.

The second sentence provides for the removal of cases dependent upon the kind of litigants, covering those which could have been originally instituted in the federal courts under the provisions of section 24 of the Judicial Code. They cover suits brought by the United States, contro-

[18] Ante, p. 219.

versies between citizens of different states, and controversies between citizens and aliens.

The third sentence provides for removing a controversy in the main case which is between citizens of different states, and which can be fully determined as to them, or controversies commonly termed separable. This provides only for controversies between citizens of different states, not for controversies between citizens and aliens.

The fourth sentence provides for the removal of controversies where prejudice or local influence can be made to appear. This covers only cases between citizens of different states.

Section 30 of the Judicial Code provides for controversies between citizens of the same state claiming under land grants of different states. Independent of this provision, such a case would have been covered by the provision of section 28 allowing the removal of any suit which could have been originally brought under the provisions of section 24 of the Code, for that section names among such cases controversies between citizens of the same state claiming lands under grants of different states, as has been previously shown; the only difference being that in case of removal the matter in dispute must exceed $3,000 in value.[19]

The next class of cases for which a removal is provided is cases against persons denied any civil right, and is covered by section 31 of the Judicial Code. Under this provision both civil and criminal cases can be removed.

The next provision as to removal is the case of suits and prosecutions against revenue officers, and is covered by section 33 of the Judicial Code.

The next provision is for the removal of suits by aliens against nonresident citizens of a state who are acting as civil officers of the United States, and is covered by section 34 of the Judicial Code.

[19] Ante, p. 226.

FEDERAL QUESTIONS

113. In suits of a civil nature at law or in equity, the defendant or defendants are given a right of removal from the state to the federal court in cases arising under the Constitution or laws of the United States, or treaties made under their authority. In order for a case to be removable under this principle, the existence of the federal question must be apparent on the face of the plaintiff's pleadings, and it must be such a case as would be cognizable by the court if the same were originally brought therein.

Cases Arising under the Constitution and Laws of the United States, Commonly Called Federal Questions

This is the first class named in section 28 of the Judicial Code, which, as stated above, covers the great mass of removable cases, and hence it is best to quote the section in full in this connection. It is as follows:

"Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state. And when in any suit mentioned in this section there shall be a

controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district. And where a suit is now pending, or may hereafter be brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause: Provided, that if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said district court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein.

"At any time before the trial of any suit which is now pending in any district court, or may hereafter be entered therein, and which has been removed to said court from a state court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said state court, the district court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to

obtain justice in said state court, it shall cause the same to be remanded thereto.

"Whenever any cause shall be removed from any state court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed: Provided, that no case arising under an act entitled 'An act relating to the liability of common carriers by railroad to their employees in certain cases,' approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

Analyzing the first sentence of this section, it will be seen that, in order to remove a case under its provisions, it must be, first, a suit of a civil nature, at law or in equity; second, it must arise under the Constitution or laws of the United States, or treaties made or which shall be made under their authority, of which the district courts are given original jurisdiction; third, it is removable only by the defendant.

The question what constitutes a suit of a civil nature at law or in equity has been discussed in connection with the original jurisdiction of the district court.[20]

The same general principles apply in connection with the removal of cases.

As shown, also, in that same connection, a mandamus proceeding is not such a suit as can be originally brought, and hence not such a suit as can be removed.[21]

[20] Ante, p. 220.

[21] Indiana v. Lake Erie & W. R. Co. (C. C.) 85 Fed. 1; State ex rel. Clark v. White River Valley R. Co., 27 S. D. 65, 129 N. W. 1034. *See "Removal of Causes," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 16, 31.*

For the same reason a mere dependent or ancillary suit cannot be removed.[22]

In order to permit the removal of a case as arising under the Constitution and laws of the United States, this must appear on the face of the plaintiff's pleadings, and cannot be made to appear by the averments of the petition to remove. The construction of the act of August 13, 1888 (25 Stat. 433, c. 866 [U. S. Comp. St. 1901, p. 508]), as carried into section 28 of the Judicial Code, in this respect makes a radical difference between it and the act of March 3, 1875 (18 Stat. 470, c. 137), which it amended. Under that act, if it appeared either by the plaintiff's pleadings, or the defense thereto, or in any way, at the time of filing the petition of removal, that the case turned on a federal question, it was removable. The reason of the difference in construction is that the later act provides that only those cases can be removed which could have been brought originally in the district court. It has been seen in discussing the original jurisdiction that the district court has no jurisdiction on the ground of a federal question being involved unless that appears from the plaintiff's own statement of his own case, and that even a statement in the plaintiff's case, by way of anticipation, that the defendants will set up a federal question, will not give the court jurisdiction.[23] Hence, as the courts would not have had jurisdiction unless this appeared from the plaintiff's own case, it follows that they cannot have jurisdiction of a case removed from a state court as involving a federal question unless the plaintiff's own statement of his case in the state court necessarily shows that a federal question was involved.

The leading case on this subject is Tennessee v. Union

[22] Farrell v. O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101; Daugherty v. Sharp (C. C.) 171 Fed. 466. *See "Removal of Causes," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 21, 22.*

[23] Ante, p. 236.

& Planters' Bank.[24] Under this principle there are many cases which naturally involve a federal question on the trial, and which cannot be removed because there is nothing on the face of the plaintiff's pleadings to show that a federal question was involved. For instance, it has been seen that a suit against a United States marshal for an illegal levy involves a federal question. Yet if the plaintiff so words his declaration that nothing appears on the face of it to show that the defendant is a United States marshal, or that he is acting in any federal capacity, but shows merely an ordinary action of trover, the case could not be removed; for the federal question would only come out in defense in such case, and hence would not appear in the plaintiff's petition.[25]

Suits against Corporations Organized under Federal Law

This principle works out interestingly in suits against corporations owing their existence to federal legislation.

It has long been settled that a federal question is involved if a suit is brought against a corporation organized by virtue of federal law. In Oregon Short Line & U. N. R. Co. v. Skottowe,[26] the plaintiff's declaration alleged that the defendant corporation was organized under state statutes, and merely held certain additional powers under an act of Congress. The court held that here, too, in order to remove on the ground of being a federal corporation, it must appear on the face of the plaintiff's pleadings to have been such, and that it did not become such merely because an act of Congress gave it some additional powers.

[24] 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511. See, also, Minnesota v. Northern Securities Co., 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870; In re Winn, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873; W. G. Coyle & Co. v. Stern, 193 Fed. 582, 113 C. C. A. 450. *See "Removal of Causes," Dec. Dig. (Key-No.) § 25; Cent. Dig. §§ 58–59.*

[25] WALKER v. COLLINS, 167 U. S. 57, 17 Sup. Ct. 738, 42 L. Ed. 76; Mayo v. Dockery (C. C.) 108 Fed. 897. *See "Removal of Causes," Dec. Dig. (Key-No.) § 25; Cent. Dig. §§ 58, 59.*

[26] 162 U. S. 490, 16 Sup. Ct. 869, 40 L. Ed. 1048. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 19, 25; Cent. Dig. §§ 37–46, 59.*

But in the later case of Texas & P. R. Co. v. Cody,[27] which was a suit by a resident of the district where the suit was brought against a nonresident corporation organized under federal law, the court held that the case could be removed by the defendant as a nonresident defendant, independent of the question of its paternity. It went on to say, however, that, while the general principle announced in the Oregon Short Line Case was correct, the case could be removed on the ground of the defendant being a federal corporation if it became such by virtue of an act of Congress which they were required to notice judicially, though there was nothing on the face of the plaintiff's declaration to show it; thus restricting to some extent the principle laid down in the Oregon Short Line Case.

Independent, however, of this question of pleading, the mere fact that a corporation is a federal corporation injects a federal question into the case. If it cannot be removed on the ground that such federal question is involved, for the reason that it does not so appear on the pleadings, there are many cases where this fact would give a right to a writ of error to the state court from the Supreme Court if the action of the state court deprived the company of any right claimed under the federal acts.[28]

However, the fact that the suit in a state court is against a receiver appointed by a federal court does not involve a federal question. In such case the statute permits suits against the receiver, who is appointed under the general

[27] 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132. In such case the right to remove is not defeated by joining other defendants with the federal corporation, but all must join in the petition to remove. In re Dunn, 212 U. S. 374, 29 Sup. Ct. 299, 53 L. Ed. 558; Texas & P. R. Co. v. Eastin & Knox, 214 U. S. 153, 29 Sup. Ct. 564, 53 L. Ed. 946. *See "Removal of Causes," Dec. Dig. (Key-No.) § 25; Cent. Dig. §§ 58, 59.*

[28] Boyd v. Great Western Coal & Coke Co. (C. C.) 189 Fed. 115; The Dalles & R. Ferry Co. v. Hendryx (C. C.) 189 Fed. 266. *See "Removal of Causes," Dec. Dig. (Key-No.) § 25; Cent. Dig. §§ 58, 59.*

chancery powers of the court, and the mere fact that he is appointed by a federal court does not make it a federal question.[29]

A federal question is not involved when a suit is brought in a state court to enjoin the importation of armed men into the state, for the purpose of controlling a strike, by a corporation organized outside of the state; the ground of the suit being that their importation would be dangerous to the peace and good order of the state.[30]

A Suit is Not Removable on the Ground that a Federal Question is Involved unless it is a Case of Which the District Court is Given Original Jurisdiction by the First Section of the Act

In order for the federal court to have original jurisdiction if the suit were brought there on the ground that a federal question was involved, it must not only be a suit of a civil nature at common law or in equity, but it must involve, exclusive of interest and costs, the sum or value of three thousand dollars. This monetary limit has been discussed in connection with the original jurisdiction.[31]

This restriction, however, limiting the right of removal to suits which could be originally brought in a federal court, refers simply to the question of jurisdiction over the subject-matter, not to the latter part of the section prescribing the district of suit. The latter requirement is a mere question of jurisdiction over the person, and is waivable, whereas the former is a question of jurisdiction, vital to maintaining any suit at all, and cannot be waived. It

[29] Gableman v. Railway Co., 179 U. S. 335, 21 Sup. Ct. 171, 45 L. Ed. 220, limiting Texas & P. Ry. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; Rural Home Tel. Co. v. Powers (C. C.) 176 Fed. 986; People of State of New York v. Bleecker St. & F. F. R. Co. (C. C.) 178 Fed. 156. *See "Removal of Causes," Dec. Dig. (Key-No.) § 19; Cent. Dig. § 48.*

[30] Arkansas v. Kansas & T. Coal Co., 183 U. S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144. *See "Removal of Causes," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 37–46.*

[31] Ante, p. 227.

was the intention of Congress by this restriction on removal of cases to limit them simply in reference to jurisdiction over the subject-matter, not in reference to jurisdiction over the person.[32]

This limitation as to original jurisdiction shuts out cases over which federal courts, as courts of equity, have no jurisdiction, though the state court would have by reason of a special state statute. As an illustration, many states have statutes permitting attacks on deeds alleged to be fraudulent, without obtaining a previous judgment. Hence a suit brought originally in a state court would be within the jurisdiction of that court. The federal courts have held, however, that these statutes cannot confer equity jurisdiction on the federal courts. Hence a case of this sort cannot be removed from a state court to the federal court, as the federal court could not entertain jurisdiction of it after it was removed: and, if such case were removed, it would remand it.[33]

On the other hand, if the state court in which the suit was originally brought would have no jurisdiction over it, and the case was removed into the federal court, the latter court would acquire no jurisdiction thereby, though it might be a case which might have been originally instituted in the federal court. In such case, the federal court would not remand, as the state court is the one which is lacking in jurisdiction, but would dismiss the case, for the federal court could not acquire jurisdiction by removal from a court which did not have jurisdiction in the first instance.

[32] MEXICAN NAT. R. CO. v. DAVIDSON, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 11, 12; Cent. Dig. §§ 29–33.*

[33] SCOTT v. NEELY, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804. *See "Removal of Causes," Dec. Dig. (Key-No.) § 11; Cent. Dig. §§ 29–31.*

An illustration of this principle is those cases where suits have been instituted in a state court to enforce certain provisions of the interstate commerce act, the enforcement of which is conferred by that act upon the federal courts alone. In such case the state courts will have no jurisdiction, and if it was removed, the federal courts would acquire no jurisdiction, though the federal courts would have jurisdiction if the suit had originally been brought there.[34]

Where a case is removed of which the federal court would have no jurisdiction, even the removing party could question the jurisdiction. This follows necessarily from the fact that, if the want of jurisdiction appears, the court can dismiss the case of its own motion, and hence either party can question it.[35]

Under this branch of jurisdiction of cases removed on the ground of a federal question being involved, the whole case goes up if a substantial federal question is really involved. In such case the court obtaining jurisdiction on the ground of a federal question will consider all the issues joined, whether federal or not.[36]

The party entitled to remove under this provision is simply the defendant, the theory of the right to remove at all being that it is necessary to protect the party from state influences. The plaintiff, having voluntarily resorted to the state court to assert such a right, could not complain if he is not allowed, after suing in that court, to proceed to

[34] Darnell v. Illinois Cent. R. Co. (C. C.) 190 Fed. 656. *See "Removal of Causes," Dec. Dig. (Key-No.) § 11; Cent. Dig. §§ 29–31.*

[35] German Savings & Loan Soc. v. Dormitzer, 116 Fed. 471, 53 C. C. A. 639; Utah-Nevada Co. v. De Lamar, 133 Fed. 113, 66 C. C. A. 179. Compare Garrozi v. Dastas, 204 U. S. 64, 27 Sup. Ct. 224, 51 L. Ed. 369. *See "Removal of Causes," Dec. Dig. (Key-No.) § 102; Cent. Dig. §§ 218–224.*

[36] Omaha Horse Ry. Co. v. Cable Tramway Co. (C. C.) 32 Fed. 727; Texas v. Day Land & Cattle Co. (C. C.) 49 Fed. 593. *See "Courts," Dec. Dig. (Key-No.) § 263; Cent. Dig. § 799; "Removal of Causes," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 204, 205.*

another. Hence in this case the removal is given to the defendant or defendants. This has been construed to mean all of the defendants. If they are all necessary parties, they must all join in the petition for removal, or the case cannot be removed.[37]

When, however, it is said that all the defendants must join in the petition for removal, it means all those who are necessary parties as defendants. The right is not defeated by the failure of nominal or formal parties to join in the petition.[38]

Even important parties who are not served, and who do not appear, are not in this sense parties to the suit, and their failure to join in the petition will not defeat the right of removal.

Tremper v. Schwabacher[39] was a suit against several partners. Only one was served with process. The others, not being served, did not appear. The court held that the one who was served could remove the case, though the others did not join in the petition.

The question what parties are necessary in suits in the federal courts has been discussed in a previous connection.[40]

Suits under the Employer's Liability Act

These suits are expressly excluded from the privilege of removal by the concluding proviso of section 28 of the Ju-

[37] Chicago, R. I. & P. R. Co. v. Martin, 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055; German Savings & Loan Soc. v. Dormitzer, 116 Fed. 471, 53 C. C. A. 639; Miller v. Le Mars Nat. Bank (C. C.) 116 Fed. 551; In re Dunn, 212 U. S. 374, 29 Sup. Ct. 299, 53 L. Ed. 558. *See "Removal of Causes," Dec. Dig. (Key-No.) § 82; Cent. Dig. § 163.*

[38] Henderson v. Cabell (C. C.) 43 Fed. 257; Shattuck v. North British & Mercantile Ins. Co., 58 Fed. 609, 7 C. C. A. 386. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 77, 82; Cent. Dig. §§ 161, 163.*

[39] (C. C.) 84 Fed. 413. There is some conflict of authority on the question. See Buck v. Felder (D. C.) 196 Fed. 419, 422, 423. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 77, 82; Cent. Dig. §§ 161, 163.*

[40] Ante, pp. 256, 269.

dicial Code. Even diverse citizenship does not give jurisdiction in such case.[41]

SUITS BY THE UNITED STATES

114. The federal jurisdiction by removal from the state courts extends to suits by the United States.

As the federal courts are given original jurisdiction of these suits by section 24 of the Judicial Code, it follows that the nonresident defendant could remove such a suit into the federal court if brought in a state court, and that, too, independent of the amount involved, as the federal courts have original jurisdiction of suits by the United States, independent of the amount involved.

[41] Symonds v. St. Louis & S. E. R. Co. (C. C.) 192 Fed. 358; Strauser v. Chicago, B. & Q. R. Co. (D. C.) 193 Fed. 293; Salek v. Pennsylvania R. Co. (C. C.) 193 Fed. 303; Ullrich v. New York, N. H. & H. R. Co. (D. C.) 193 Fed. 768; Hulac v. Chicago & N. W. R. Co. (D. C.) 194 Fed. 747; Stafford v. Norfolk & W. R. Co. (D. C.) 202 Fed. 605. Contra: Van Brimmer v. Texas & P. R. Co. (C. C.) 190 Fed. 394. *See "Removal of Causes," Dec. Dig. (Key-No.) § 3; Cent. Dig. §§ 4, 5.*

CHAPTER XV

THE DISTRICT COURT (Continued)—JURISDICTION BY REMOVAL (Continued)

115. Controversies between Citizens of Different States.
116. Devices to Prevent Removal.
117. Controversies between Citizens of the Same State Claiming Lands under Grants of Different States.
118. Controversies between Citizens of a State and Foreign States, Citizens or Subjects.
119. Parties Entitled to Remove.
120. Separable Controversies.
121. Removal on Ground of Prejudice or Local Influence.
122. Removal because of State Denial of Equal Civil Rights.
123. Removal of Suits against Officers or Persons Enforcing the Internal Revenue Laws.

CONTROVERSIES BETWEEN CITIZENS OF DIFFERENT STATES

115. The twenty-fourth section of the Judicial Code gives the federal courts jurisdiction of suits of a civil nature at common law or in equity in which there shall be a controversy between citizens of different states, and in which the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000; and the twenty-eighth section gives the right of removal in such cases. This is much the most frequent ground of removal in actual practice. In order to give the right of removal, the requisites must concur which have been discussed in connection with the original jurisdiction of such suits.[1]

If the suit, for instance, is not such a suit as the federal court could entertain under its general equity jurisdiction,

[1] Ante, p. 218.

though the state court could entertain it, like a suit by a simple-contract creditor to set aside a conveyance which could be brought in a state court by virtue of a state statute, then the federal courts cannot take jurisdiction, but in such case would have to remand.[2]

In this class of cases, also, if the court has jurisdiction over the subject-matter of the case, it may be removed, though the suit is not brought in the district of the defendant's residence.[3]

As to suits brought in a state court in a district where neither plaintiff nor defendant resided, the earlier decisions preponderated in favor of the doctrine that the defendant could remove such a case, on the theory that the defendant alone was interested in the place of suit; but later cases have established the doctrine that such a case is not removable by defendant without the consent or waiver of the question by plaintiff.[4]

Removal as Affected by Assignment

This clause limiting removable cases to those cases of which the courts are given original jurisdiction has wrought one other important change in the law. The previous acts did not have such a clause, and hence it was held under them that the clause forbidding the assignee to bring suit unless his assignor could also sue applied only to cases originally instituted in the federal courts, and did not pre-

[2] SCOTT v. NEELY, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804; Anderson v. Sharp (C. C.) 189 Fed. 247; ante, pp. 224, 225. *See "Removal of Causes," Dec. Dig. (Key-No.) § 102; Cent. Dig. §§ 218–224.*

[3] MEXICAN NAT. R. CO. v. DAVIDSON, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672. *See "Removal of Causes," Dec. Dig. (Key-No.) § 12; Cent. Dig. §§ 32, 33.*

[4] In re Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264; In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; Ex parte Harding, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392; Puget Sound Sheet Metal Works v. Great Northern R. Co. (D. C.) 195 Fed. 350. *See "Removal of Causes," Dec. Dig. (Key-No.) § 12; Cent. Dig. §§ 32, 33.*

vent the removal of such cases when originally instituted in the state courts. But the above change in the law has placed original suits and removable cases on the same footing, so that now a suit by an assignee in a state court cannot be removed into the federal court on the ground of diverse citizenship unless it could have been originally instituted in the federal court.[5]

In discussing the original jurisdiction of the courts, it has been seen that all the parties on each side must be capable of suing or being sued. This same principle applies to cases removable on the ground of diverse citizenship.[6]

It is also true in removal as in original cases that this principle only applies to necessary parties, and that the joinder of nominal or unnecessary parties will not defeat the right of removal.[7]

DEVICES TO PREVENT REMOVAL

116. The removal of a case may be prevented by various devices, as by assigning the cause of action to a plaintiff incompetent to sue in the federal courts, or by so framing the suit as to make parties defendants who would defeat the jurisdiction; and such devices are successful in the absence of bad faith.

[5] MEXICAN NAT. R. CO. v. DAVIDSON, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672; Board of Com'rs of Delaware County v. Diebold Safe & Lock Co., 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 674. *See "Removal of Causes," Dec. Dig. (Key-No.) § 11; Cent. Dig. §§ 29–31.*

[6] Ante, p. 255; Gage v. Carraher, 154 U. S. 656, 14 Sup. Ct. 1190, 25 L. Ed. 989; Blake v. McKim, 103 U. S. 336, 26 L. Ed. 563. *See "Removal of Causes," Dec. Dig. (Key-No.) § 29; Cent. Dig. § 69.*

[7] Patterson v. Railroad Co. (C. C.) 111 Fed. 262; Bacon v. Rives, 106 U. S. 99, 1 Sup. Ct. 3, 27 L. Ed. 69; Ex parte State of Nebraska, 209 U. S. 436, 28 Sup. Ct. 581, 52 L. Ed. 876; Lawrence v. Southern Pac. Co. (C. C.) 165 Fed. 241; ante, p. 256. *See "Removal of Causes," Dec. Dig. (Key-No.) § 31; Cent. Dig. § 71.*

It has been seen in the previous discussion [8] that devices to confer jurisdiction upon the federal courts are forbidden by the law. It is, however, a rule which does not work both ways. Devices to prevent such jurisdiction are frequently successful.

In Oakley v. Goodnow [9] an Iowa corporation which had a claim against a citizen of New York transferred it to another citizen of New York under an agreement that the latter should act as trustee in collecting the fund, and account to the assignor for it. The defendant (the law not then limiting the right of removal to nonresident defendants) attempted to remove the case to the federal court, claiming that this was a mere device to defeat jurisdiction. The Supreme Court, however, held that it was a device which accomplished its purpose, and that his only relief was in the state court.

It is not an uncommon practice to join other defendants for the purpose of defeating jurisdiction.

In personal injury suits, for instance, against nonresident corporations, it is not uncommon for a plaintiff who may desire to prevent removal to join with the corporation itself the employé who was responsible for the accident, if his citizenship is the same as that of the plaintiff. Under such circumstances the right of removal would be defeated if the cause of action asserted is bona fide, for the plaintiff has the right, in an honest discretion, to bring his suit this way; and this is true though the parties joined might have different defenses, for the right of removal is judged independent of the defense, and the court has no right to dictate to the plaintiff how he should bring his suit.[10]

[8] Ante, p. 285.

[9] 118 U. S. 43, 6 Sup. Ct. 944, 30 L. Ed. 61. *See "Removal of Causes," Dec. Dig. (Key-No.) § 35; Cent. Dig. §§ 77, 78.*

[10] Charman v. Lake Erie & W. R. Co. (C. C.) 105 Fed. 449; Chicago, R. I. & P. R. Co. v. Martin, 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055; Person v. Illinois Cent. R. Co. (C. C.) 118 Fed. 342. Compare Helms v. Northern Pac. R. Co. (C. C.) 120 Fed. 389. *See "Removal of Causes," Dec. Dig. (Key-No.) § 36; Cent. Dig. § 79.*

On the other hand, where such a joinder is made with the knowledge on the plaintiff's part that the allegations on which it is based are false, and that he cannot expect to recover, and with the intent on his part to defeat the right of removal, he will fail in his object, and the court, on proper charges in the petition, will permit such removal. Such a right of removal, however, when sustainable under these authorities, rests upon the necessity of practically proving bad faith, and a motive to defeat removal is not sufficient evidence of bad faith.[11]

Rearrangement of Parties

In passing upon the right of removal, the same principle applies as in original suits. The court judges of the right by the actual interest of the parties, and not by the method in which the pleader may choose to arrange them.[12]

[11] Wecker v. National Enameling & Stamping Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757; Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521; Chicago, R. I. & P. R. Co. v. Dowell, 229 U. S. 102, 33 Sup. Ct. 684, 57 L. Ed. ——; Hukill v. Maysville & B. S. R. Co. (C. C.) 72 Fed. 745; Union Terminal R. Co. v. Chicago, B. & Q. R. R. Co. (C. C.) 119 Fed. 209; Bryce v. Southern R. Co. (C. C.) 125 Fed. 958; Crawford v. Illinois Cent. R. Co. (C. C.) 130 Fed. 395; Boatmen's Bank of St. Louis v. Fritzlen, 135 Fed. 650, 68 C. C. A. 288; McGuire v. Great Northern R. Co. (C. C.) 153 Fed. 434; Foster v. Coos Bay Gas & Electric Co. (C. C.) 185 Fed. 979; Enos v. Kentucky Distilleries & Warehouse Co., 189 Fed. 342, 111 C. C. A. 74; Armstrong v. Kansas City Southern R. Co. (C. C.) 192 Fed. 608; Clark v. Chicago, R. I. & P. R. Co. (D. C.) 194 Fed. 505. *See "Removal of Causes," Dec. Dig. (Key-No.) § 36; Cent. Dig. § 79.*

[12] Removal Cases, 100 U. S. 457, 25 L. Ed. 593; Evers v. Watson, 156 U. S. 527, 15 Sup. Ct. 430, 39 L. Ed. 520; Steele v. Culver, 211 U. S. 26, 29 Sup. Ct. 9, 53 L. Ed. 74. *See "Removal of Causes," Dec. Dig. (Key-No.) § 37; Cent. Dig. § 80.*

CONTROVERSIES BETWEEN CITIZENS OF THE SAME STATE CLAIMING LANDS UNDER GRANTS OF DIFFERENT STATES

117. As the federal courts are given jurisdiction of controversies between citizens of the same state claiming lands under grants of different states, such a case would be removable.

In such case, however, there is a special provision in section 30 of the Judicial Code, which shows the method under which it is necessary to make it appear to the court that such a question is involved. The language of that section is as follows: "If in any action commenced in a state court the title of land be concerned, and the parties are citizens of the same state and the matter in dispute exceeds the sum or value of three thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim, and shall rely upon, a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other state, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial. If he or they inform the court that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this chapter, remove the cause for trial to the district court of the United States next to be holden in such district; and any one of

either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim."

It should be noted that no monetary limit is required in suits of this nature originally instituted in the district court under section 24 of the Judicial Code, whereas there is a limit of $3,000 as to suits removed on this ground.

CONTROVERSIES BETWEEN CITIZENS OF A STATE AND FOREIGN STATES, CITIZENS OR SUBJECTS

118. In such case the right of removal exists, as it is a class of which the federal courts are given original jurisdiction by the twenty-fourth section of the Judicial Code.

This class does not cover controversies between aliens. Of such cases the federal courts have no jurisdiction.[13]

There is a conflict of decision on the question whether a federal court would have jurisdiction in a case where citizens of a state are plaintiffs, and citizens of a different state and aliens are defendants.

In Tracy v. Morel [14] it is held that this latter is a casus omissus in the statute, and that the federal courts would not have jurisdiction. On the other hand, in Roberts v. Pacific & A. R. & Nav. Co.[15] Judge Hanford, in a well-con-

[13] Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A., 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195; Pooley v. Luco (C. C.) 72 Fed. 561; ante, p. 262. *See "Removal of Causes," Dec. Dig. (Key-No.) § 41; Cent. Dig. §§ 82½–84.*

[14] (C. C.) 88 Fed. 801. *See "Removal of Causes," Dec. Dig. (Key-No.) § 41; Cent. Dig. §§ 82½–84.*

[15] (C. C.) 104 Fed. 577, affirmed on this point but reversed on the merits 121 Fed. 785, 58 C. C. A. 61. *See "Removal of Causes," Dec. Dig. (Key-No.) § 41; Cent. Dig. §§ 82½–84.*

sidered opinion, holds that such a case would fall within the federal jurisdiction. It seems to the author that, however liberally the removal act ought to be construed, the line of decisions holding that the case does not fall within the jurisdiction of the federal courts best accords with the statute. If a federal court has jurisdiction, it must be under one of two phrases in the first section of the Act of August 13, 1888—either on the language, (1) "in which there shall be a controversy between citizens of different states"; or (2) "a controversy between citizens of a state and foreign states, citizens or subjects."

If the rulings of the federal courts in other connections to the effect that a "controversy between citizens of different states" means a controversy in which all the citizens on one side and all the citizens on the other are citizens of different states, jurisdiction in the case supposed could certainly not be supported upon that, for one of the parties defendant in such case is not a citizen, but an alien. On the other hand, if that same principle of construction is applied to the second class, a controversy in the case supposed is not between citizens of a state and foreign states, citizens or subjects, for one of the defendants is neither a foreign state, citizen nor subject, but a citizen of a different state. This would seem to be the necessary construction of the statute, and this is the view taken by the standard work on the subject.[16]

A suit by an alien against a corporation, nonresident in the district where the suit is brought, is removable by the nonresident corporation.[17] And so as to a suit by a citizen

[16] Black, Dill. Rem. Causes, § 34.

[17] Stalker v. Pullman's Palace-Car Co. (C. C.) 81 Fed. 989; Decker v. Southern R. Co. (C. C.) 189 Fed. 224; Smellie v. Southern Pac. Co. (D. C.) 197 Fed. 641. But there is some conflict. Odhner v. Northern Pac. R. Co. (C. C.) 188 Fed. 507. *See "Removal of Causes," Dec. Dig. (Key-No.) § 27; Cent. Dig. §§ 64–68.*

against an alien.[18] But not a suit by a state against an alien nonresident.[19]

PARTIES ENTITLED TO REMOVE

119. Under all the classes of cases previously discussed, except cases arising under the Constitution and laws of the United States, the right of removal is in the defendant, provided he is a nonresident.

As the right to confer jurisdiction in such cases on the federal courts is based on the theory of protection from local prejudice or injustice, it is natural that only the nonresident should have the right to remove in cases where the jurisdiction does not depend upon a federal question; and the statute follows this theory in the second sentence of section 28 of the Judicial Code.

Here, too, the principle applies that all of the defendants who are necessary parties must join in the petition to remove, and that all must be nonresidents. Though the citizenship might otherwise be such as would give the federal courts jurisdiction over the subject-matter, still in this case only the nonresident can remove.[20]

If, however, the permanent residence of the defendant is outside of the district where suit is brought, his temporary

[18] Wind River Lumber Co. v. Frankfort Marine, Accident Plate Glass Ins. Co., 196 Fed. 340, 116 C. C. A. 160. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 27, 45; Cent. Dig. §§ 64–68, 89.*

[19] O'Conor v. Texas, 202 U. S. 501, 26 Sup. Ct. 726, 50 L. Ed. 1120. *See "Removal of Causes," Dec. Dig. (Key-No.) § 41; Cent. Dig. §§ 82½–84.*

[20] Martin v. Snyder, 148 U. S. 663, 13 Sup. Ct. 706, 37 L. Ed. 602; Blackburn v. Blackburn (C. C.) 142 Fed. 901; Hackett v. Kuhne (C. C.) 157 Fed. 317; McNaul v. West Indian Securities Corp. (C. C.) 178 Fed. 308. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 44, 45; Cent. Dig. §§ 88, 89.*

residence in the district will not defeat his right of removal.[21]

The nominal plaintiff may sometimes be the real defendant and as such entitled to remove, as under state statutes prescribing that a party who cannot really control the litigation shall occupy the position of plaintiff on the record.[22]

SEPARABLE CONTROVERSIES

120. The jurisdiction by removal from state courts extends to controversies wholly between citizens of different states, and which can be fully determined as between them, when removal could be had as to any one or more of the defendants under the general principles heretofore discussed; such right of removal being granted in such cases to any one or more defendants actually interested.

In order to justify a removal on this ground, the controversy in a suit must be a separate and distinct cause of action, on which a separate suit could be maintained as between the parties thereto, independent of the others, and not a mere incidental controversy growing out of the main suit.

This class of removal cases is commonly called separable controversies.

In order to obtain a removal on this ground, it must appear from the plaintiff's pleadings that the controversy which it is desired to remove is a separable controversy.

The third sentence of section 28 of the Judicial Code provides: "And when in any suit mentioned in this section

[21] Chiatovich v. Hanchett (C. C.) 78 Fed. 193. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 44, 45; Cent. Dig. §§ 88, 89.*

[22] Mason City & Ft. D. R. Co. v. Boynton, 204 U. S. 570, 27 Sup. Ct. 321, 51 L. Ed. 629. *See "Removal of Causes," Dec. Dig. (Key-No.) § 44; Cent. Dig. § 88.*

there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district."

This is the class of removable cases commonly spoken of as separable controversies—a class which has been much discussed in the courts. It applies only to controversies between citizens of different states, so that controversies between citizens and aliens are not included.[23]

In this class of cases, although the citizenship of the parties on whom the right of removal is conferred can be made to appear in the petition for removal, and need not necessarily appear in the plaintiff's pleading, as such an allegation is not a part of any system of pleading, it must nevertheless appear from the plaintiff's pleading that the controversy which it is desired to remove is a separable controversy. Its capacity of severance must be decided solely upon the plaintiff's pleading, not upon the petition for removal, nor upon the defense set up. There may be separate issues in a case, but they do not constitute separable controversies. There may be defenses which are good as to some, and not as to others, but they do not make separable controversies.[24]

The courts have narrowed very much the cases which are removable under this act. As has been stated above, the fact that the issues or defenses are separate does not make the controversy separate. It is equally well settled

[23] Creagh v. Equitable Life Assurance Society of United States (C. C.) 88 Fed. 1. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 48, 59; Cent. Dig. § 94.*

[24] Fidelity Ins., Trust & Safe Deposit Co. v. Huntington, 117 U. S. 280, 6 Sup. Ct. 733, 29 L. Ed. 898; Putnam v. Ingraham, 114 U. S. 57, 5 Sup. Ct. 746, 29 L. Ed. 65; Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 474; Foster v. Coos Bay Gas & Electric Co. (C. C.) 185 Fed. 979. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 48, 61; Cent. Dig. §§ 94, 115.*

that even a controversy which is separable does not give a ground of removal if that controversy is a question merely incidental to the main controversy in the cause, and not of itself a principal controversy. For instance, Graves v. Corbin [25] was a bill to subject partnership assets to the payment of debts, and to set aside, as fraudulent, certain judgments confessed by the partnership. It was held that one of these judgment creditors could not remove the case, as the question of the validity of his judgment, though depending on different grounds, was a mere incident to the main litigation, which was to wind up the partnership assets.

So, in Torrence v. Shedd,[26] which was a partition suit, a dispute between two of the parties in that suit as to their relative interests in the share of one of these parties was not so separable as to give the right of removal.

In Bellaire v. Baltimore & O. R. Co.[27] which was a proceeding by the city of Baltimore to condemn a right of way for a street across a strip of land, to which the owner and the lessee were made parties, it was held that the lessee could not remove, although its interests would be separately valued, as that was a mere incident to the main question, which was the right of condemnation at all.

In Colburn v. Hill,[28] which was a creditors' suit to wind up a corporation, and distribute its assets, and exclude certain defendants from sharing in the assets on the ground that a certain contract held by them with the corporation

[25] 132 U. S. 571, 10 Sup. Ct. 196, 33 L. Ed. 462. See, also, Miller v. Clifford, 133 Fed. 880, 67 C. C. A. 52, 5 L. R. A. (N. S.) 49. *See "Removal of Causes," Dec. Dig. (Key-No.) § 52; Cent. Dig. §§ 102–105.*

[26] 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528. *See "Removal of Causes," Dec. Dig. (Key-No.) § 51; Cent. Dig. § 101.*

[27] 146 U. S. 117, 13 Sup. Ct. 16, 36 L. Ed. 910. *See "Removal of Causes," Dec. Dig. (Key-No.) § 51; Cent. Dig. § 101.*

[28] 101 Fed. 500, 41 C. C. A. 467. *See "Removal of Causes," Dec. Dig. (Key-No.) § 53; Cent. Dig. § 104.*

was invalid, it was held that these defendants could not remove the case on the ground of a separable controversy.

The Supreme Court has repeatedly said that, in order to justify a removal on this ground, the controversy in the suit must be a separate and distinct cause of action, on which a separate suit might have been maintained as between the parties therein interested, independent of the others.[29]

Under these principles, suits on joint or joint and several contractual liabilities are not removable by some of the defendants. If the plaintiff elects to bring his suit in such a shape as to claim a joint liability against the defendants on contract, it is not for them to prevent him from trying his suit in his own way; and part of them cannot, therefore, obtain a removal on this ground.[30]

On the same principle, a case which appears from the plaintiff's declaration to be a joint action in tort against several defendants cannot be removed by one of those defendants.[31]

There have been many decisions on the question of suits for personal injuries where both the defendant corporation and the employé causing the accident are sued. In such case, if, as far as the pleadings show, the cause of action is a joint one, it cannot be removed by one of the two defendants. This, however, though to a certain extent a

[29] HYDE v. RUBLE, 104 U. S. 407, 26 L. Ed. 823; Fraser v. Jennison, 106 U. S. 191, 1 Sup. Ct. 171, 27 L. Ed. 131. *See "Removal of Causes," Dec. Dig. (Key-No.) § 48; Cent. Dig. §§ 93, 94.*

[30] Louisville & N. R. Co. v. Ide, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63; STONE v. SOUTH CAROLINA, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; Lewis v. Cincinnati, N. O. & T. P. Ry. Co. (C. C.) 192 Fed. 654; ante, pp. 323, 324. *See "Removal of Causes," Dec. Dig. (Key-No.) § 49; Cent. Dig. §§ 95–99.*

[31] Pirie v. Tvedt, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331; CHESAPEAKE & O. RY. CO. v. DIXON, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; Chicago, R. I. & P. R. Co. v. Dowell, 229 U. S. 102, 33 Sup. Ct. 684, 57 L. Ed. ——; Stevenson v. Illinois Cent. R. Co. (C. C.) 192 Fed. 956. *See "Removal of Causes," Dec. Dig. (Key-No.) § 49; Cent. Dig. §§ 95–99.*

question of pleading, depends upon the further question whether such suits are, in fact and in law, joint suits against the employer and employé.

In Chesapeake & O. Ry. Co. v. Dixon,[32] referred to in a previous connection, the Supreme Court was careful to base its opinion upon the fact that the declaration alleged joint negligence; and the decision was influenced to some extent by the fact that in Kentucky, where the action arose, the decisions were that a joint action by an injured party against an employer and employé was one in which they were jointly liable. But in Helms v. Northern Pac. R. Co.[33] Judge Amidon, in an exceedingly well considered opinion, reviewing the authorities, including the above-named Supreme Court case, held that under certain circumstances, at least, such a suit would not be a suit for a joint tort; that the liability of a master and servant rested on different grounds; and that, unless it appeared from the declaration, or at least was consistent with it, that the negligence complained of was such a negligence as gave a joint cause of action, the defendant could remove. The case was a suit by a servant against the fellow servant who caused the negligence, and the corporation who employed them both. At common law the corporation would not

[32] 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121. See, also, Southern Ry. Co. v. Carson, 194 U. S. 136, 24 Sup. Ct. 609, 48 L. Ed. 907; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147; Cincinnati, N. O. & T. P. R. Co. v. Bohon, 200 U. S. 221, 26 Sup. Ct. 166, 50 L. Ed. 448, 4 Ann. Cas. 1152; Southern R. Co. v. Miller, 217 U. S. 209, 30 Sup. Ct. 450, 54 L. Ed. 732; Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521; Chicago, R. I. & P. R. Co. v. Schwyhart, 227 U. S. 184, 33 Sup. Ct. 250, 57 L. Ed. ——. *See "Removal of Causes," Dec. Dig. (Key-No.) § 49; Cent. Dig. §§ 95–99.*

[33] (C. C.) 120 Fed. 389. The question is influenced greatly by the consideration whether under the law of the state the suit would be a joint one. McAllister v. Chesapeake & O. R. Co. (D. C.) 198 Fed. 660; Chicago, R. I. & P. R. Co. v. Schwyhart, 227 U. S. 184, 33 Sup. Ct. 250, 57 L. Ed. ——. *See "Removal of Causes," Dec. Dig. (Key-No.) § 49; Cent. Dig. §§ 95–99.*

have been liable, on account of the fellow-servant principle, but was made liable by a state statute. Consequently he held that the liability of the defendant employé was on the ground of negligence, and that of the company on the language of the statute, which did not necessarily require negligence, and hence that the causes of action were separate, and that the case could be removed.

Where the grounds of negligence against the company and employé are different, especially where the ground as to one is statutory, there is a separable controversy.[34]

In separable controversies the principle also applies that the right of removal depends upon those who are necessary parties, grouped or rearranged according to the actual interests of the parties, and not according to the fancy of the pleader.[35]

A party is not a necessary party who has not been served with process and brought before the court when the plaintiff proceeds to trial against the one in court. In Berry v. St. Louis & S. F. R. Co.,[36] which was a suit against a resident and nonresident, and in which process was not served on the resident defendant, it was held that the nonresident could remove the case, though the liability asserted

[34] Lockard v. St. Louis & S. F. R. Co. (C. C.) 167 Fed. 675; Evansberg v. Insurance Stove Range & Foundry Co. (C. C.) 168 Fed. 1001; Jackson v. Chicago, R. I. & P. R. Co., 178 Fed. 432, 102 C. C. A. 159; Marach v. Columbia Box Co. (C. C.) 179 Fed. 412; Shaver v. Pacific Coast Condensed Milk Co. (C. C.) 185 Fed. 316; Nichols v. Chesapeake & O. R. Co., 195 Fed. 913, 115 C. C. A. 601; Cayce v. Southern R. Co. (D. C.) 195 Fed. 786. *See "Removal of Causes," Dec. Dig. (Key-No.) § 49; Cent. Dig. §§ 95–99.*

[35] Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. Ed. 1122; Lamm v. Parrott Silver & Copper Co. (C. C.) 111 Fed. 241; Ireton v. Pennsylvania Co., 185 Fed. 84, 107 C. C. A. 304. *See "Removal of Causes," Dec. Dig. (Key-No.) § 48; Cent. Dig. §§ 93, 94.*

[36] (C. C.) 118 Fed. 911; ante, p. 318. But there is some conflict, though the text states in the opinion of the author the better doctrine. Compare Armstrong v. Kansas City Southern R. Co. (C. C.) 192 Fed. 608. *See "Removal of Causes," Dec. Dig. (Key-No.) § 49; Cent. Dig. §§ 95–99.*

was joint and several, as the plaintiff, by not bringing the resident defendant into court and pushing his case against the other, had voluntarily elected to make the controversy separable.

In order to sustain a removal on the ground of separable controversy, it is necessary—as, indeed, is stated in the statute—that the controversy must be fully determinable as between the parties to that controversy.[37]

The following are instances of controversies held separable:

A suit to avoid an alleged fraudulent transfer between two corporations, to which the directors of one of the corporations were made parties, though not for the purpose of any actual relief against them, was held removable, though the plaintiff and some of the directors were citizens of the same state.[38]

A suit against a corporation alleged to be insolvent, and a second defendant alleged to have assumed its debts, was held to be removable by the second defendant.[39]

A suit involving the liability of the officers of a corporation for damages for alleged misconduct as such officers, no conspiracy or concerted action among them being alleged, was held removable by some of these officers.[40]

[37] East Tennessee, V. & G. R. Co. v. Grayson, 119 U. S. 240, 7 Sup. Ct. 190, 30 L. Ed. 382; Wilson v. Oswego Tp., 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70; Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A., 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195. *See "Removal of Causes," Dec. Dig. (Key-No.) § 57; Cent. Dig. § 109.*

[38] Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. Ed. 1122. Also in a foreclosure suit, an attack by mortgagor and mortgagee on the validity of a prior mortgage is removable by the prior mortgagee. Fritzlen v. Boatmen's Bank, 212 U. S. 364, 29 Sup. Ct. 366, 53 L. Ed. 551. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 48, 53; Cent. Dig. §§ 93, 94, 104.*

[39] Mecke v. Valleytown Mineral Co., 93 Fed. 697, 35 C. C. A. 151. See, as analogous, Stimson v. United Wrapping Mach. Co. (C. C.) 156 Fed. 298. *See "Removal of Causes," Dec. Dig. (Key-No.) § 50; Cent. Dig. § 100.*

[40] Youtsey v. Hoffman (C. C.) 108 Fed. 693. *See "Removal of Causes," Dec. Dig. (Key-No.) § 49; Cent. Dig. §§ 95–99.*

A suit against two defendants in tort on entirely disconnected grounds was held to be removable.[41]

A suit by a stockholder against his corporation and a second corporation, attacking the management of the first corporation by the second, was held removable by the second, as the cause of action asserted was one in which the stockholder and his own corporation were practically interested alike, and against the second.[42]

A bill to quiet title against several defendants not claiming through any common source was held removable by some of these defendants.[43]

On the other hand, in Little v. Giles[44] a suit to quiet title, which alleged that the defendants were conspirators in their efforts to cloud the title, was held not to be a separable controversy.

The parties entitled to remove on the ground of a separable controversy are, in the language of the statute, either one or more of the defendants actually interested.[45]

Does This Apply to Resident Defendants?

There is a difference of decision on the question whether this right of removal under the separable controversy clause is conferred on any defendants, or simply on nonresident defendants. On the one hand, it is urged that the reason for giving the removal is the same as in any other case where it is limited to nonresidents, and that this must have been the policy of Congress. On the other hand, it

[41] Coker v. Monaghan Mills (C. C.) 110 Fed. 803. *See "Removal of Causes," Dec. Dig. (Key-No.) § 50; Cent. Dig. § 100.*

[42] Lamm v. Parrott Silver & Copper Co. (C. C.) 111 Fed. 241. *See "Removal of Causes," Dec. Dig. (Key-No.) § 48; Cent. Dig. §§ 93, 94.*

[43] Carothers v. McKinley Mining & Smelting Co. (C. C.) 116 Fed. 947; McMullen v. Halleck Cattle Co. (C. C.) 193 Fed. 282. *See "Removal of Causes," Dec. Dig. (Key-No.) § 52; Cent. Dig. §§ 102–105.*

[44] 118 U. S. 596, 7 Sup. Ct. 32, 30 L. Ed. 269. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 52, 55; Cent. Dig. §§ 102–105.*

[45] Rand v. Walker, 117 U. S. 340, 6 Sup. Ct. 769, 29 L. Ed. 907. *See "Removal of Causes," Dec. Dig. (Key-No.) § 59; Cent. Dig. §§ 112, 113.*

is urged that the language of the statute does not limit the right to nonresident defendants.[46]

A careful perusal of the statute would seem to indicate that the authorities holding any defendant, whether resident or not, entitled to remove, best accord with its language. Where the language of the statute itself is plain, it is unnecessary to resort to rules of construction or policy. A legislature is presumed to have said what it meant, and to have meant what it said. When this entire section is examined, it is to be observed that the first section, which gives the right of removal in federal questions, confers it upon the defendant or defendants whether they are resident or not. Then the second section, which gives the right of removal on the ground of citizenship, gives the right only to the defendant or defendants who are nonresidents. Then comes the third clause, which is the one under discussion, and which simply speaks of the defendants, and says nothing about their residence.

Then the fourth clause, conferring the right in cases of prejudice or local influence, limits it to the defendant who is a citizen of another state. Congress, in thus varying the language in these different sentences of the same section, must be presumed to have done so intentionally; and it is beyond the purview of the courts to read into its act a sentence that it has deliberately inserted in one place and omitted in another. In the judgment of the author, therefore, the defendant, whether resident or not, ought to have the right of removal on this ground.

The effect of the removal of a separable controversy is to take with it not simply that controversy, but the entire suit. It was not the intent of Congress to split a suit up into different parts, and leave it to be considered by different courts; and the express language of the act is that when

[46] Stanbrough v. Cook (C. C.) 38 Fed. 369, 3 L. R. A. 400; Thurber v. Miller, 67 Fed. 371, 14 C. C. A. 432. *See "Removal of Causes," Dec. Dig. (Key-No.) § 60; Cent. Dig. § 114.*

a controversy exists in a suit, and that is removed, the suit itself goes with it.[47]

And this is true though the effect may be to take into the federal court, along with this separable controversy, other grounds of action of which the court would not have had jurisdiction, had they been brought in the federal court independently.[48]

REMOVAL ON GROUND OF PREJUDICE OR LOCAL INFLUENCE

121. This ground entitles the nonresident defendant to remove, but only on proof of the existence of such prejudice or local influence.

The fourth sentence of section 28 of the Judicial Code provides as follows: "And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause: Provided, that if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being

[47] BARNEY v. LATHAM, 103 U. S. 205, 26 L. Ed. 514; Connell v. Smiley, 156 U. S. 335, 15 Sup. Ct. 353, 39 L. Ed. 443. *See "Removal of Causes," Dec. Dig. (Key-No.) § 58; Cent. Dig. § 110.*

[48] Hoge v. Canton Insurance Office of Hong Kong (C. C.) 103 Fed. 513. *See "Removal of Causes," Dec. Dig. (Key-No.) § 58; Cent. Dig. § 110.*

affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said district court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein."

This provision of the Judicial Code repeals the previous acts on the subject, as the act of August 13, 1888, had been held to supersede the acts which preceded it.[49]

The language of this sentence is quite different from those of the three preceding sentences. The first limits the removal of cases on the ground of a federal question to those of which the district courts are given original jurisdiction by the preceding section. The second, regulating the removal of entire controversies on the ground of citizenship, also applies only to those cases of which the district courts are given jurisdiction by the preceding section. The third, authorizing removal on the ground of a separable controversy, limits such right to "any suit mentioned in this section," which amounts to the same thing. The fourth contains no such qualifying clause, and, independent of authority, it may be questioned whether this qualification was intended to be inserted. However, the Supreme Court, in Re Pennsylvania Co.,[50] in which the question involved was whether the two thousand dollar limit applied to causes removed on the ground of prejudice or local influence, construing the acts preceding the Code, held that it was the intention of Congress to limit these causes, also, to those of which the court would have had original jurisdiction. The court construed the first part of the sentence, "where a suit is now pending" to be equivalent to the words "and when in any suit mentioned in this section." The re-

[49] Fisk v. Henarie, 142 U. S. 459, 12 Sup. Ct. 207, 35 L. Ed. 1080; Hanrick v. Hanrick, 153 U. S. 192, 14 Sup. Ct. 835, 38 L. Ed. 685. *See "Removal of Causes," Dec. Dig. (Key-No.) § 2; Cent. Dig. §§ 2, 3.*

[50] 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738. *See "Removal of Causes," Dec. Dig. (Key-No.) § 11; Cent. Dig. §§ 29–31.*

enactment of them in the Judicial Code indicates the intention of Congress to adopt this construction.

The Parties

The controversy removable under the language of the statute is "a controversy between a citizen of the state in which the suit is brought and a citizen of another state." Hence controversies between citizens and aliens are not removable on this ground.[51]

In reference to the parties plaintiff, the word is used collectively, and under the principles established in other cases of jurisdiction, the plaintiffs, where there are more than one, must be citizens of the state where the suit is brought.[52]

Whether all the plaintiffs and all the defendants must be different in citizenship is a question on which there was a violent conflict of authority. Under the removal acts previous to the present, this was necessary.[53]

But the language of the present section is that "any defendant" may remove the case. Influenced by this language, there is a line of authorities to the effect that any defendant who is a citizen of another state from that in which the suit is brought can remove it, though there are other defendants whose citizenship is the same as that of the plaintiff.[54]

On the other hand, there are authorities which hold that the controversy itself must be one in which all the plaintiffs are of a different citizenship from all of the defendants,

[51] Grand Trunk R. Co. v. Twitchell, 59 Fed. 727, 8 C. C. A. 237. *See "Removal of Causes," Dec. Dig. (Key-No.) § 67; Cent. Dig. §§ 120–124.*

[52] Gann v. Northeastern R. Co. (C. C.) 57 Fed. 417. *See "Removal of Causes," Dec. Dig. (Key-No.) § 67; Cent. Dig. § 120.*

[53] Rosenthal v. Coates, 148 U. S. 142, 13 Sup. Ct. 576, 37 L. Ed. 399. *See "Removal of Causes," Dec. Dig. (Key-No.) § 68; Cent. Dig. §§ 122, 123.*

[54] Montgomery County v. Cochran (C. C.) 116 Fed. 985; Jackson & Sharp Co. v. Pearson (C. C.) 60 Fed. 113; Bonner v. Meikle (C. C.) 77 Fed. 485. *See "Removal of Causes," Dec. Dig. (Key-No.) § 68; Cent. Dig. §§ 122, 123.*

and that, if the controversy is of that character, then any nonresident defendant may remove.[55]

The question has recently been set at rest by the Supreme Court, which holds that removals on the ground of local prejudice must, like those under the rest of the section, be suits originally cognizable in the district court, and are governed by the same principles as to parties.[56]

Conditions on Which Removal is Allowed—Procedure

The statute gives the right of removal when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such state court or in any other state court to which he is entitled to remove the case.

There is nothing in the statute to show how this must be made to appear. The better authority is that a petition should be filed in the federal court alleging not merely the petitioner's belief or the bare statement of prejudice or local influence, but setting out such facts as would show it.[57]

It then becomes a question for the district court whether to require proof, and what kind of proof should be required. The court must be not morally, but legally satisfied of the existence of such prejudice or local influence; and it may, in its discretion, allow proof of such fact by affidavit.[58]

On this petition in the federal court an order is obtained

[55] Campbell v. Milliken (C. C.) 119 Fed. 982. *See "Removal of Causes," Dec. Dig. (Key-No.) § 68; Cent. Dig. §§ 122, 123.*

[56] Cochran v. Montgomery County, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182, 4 Ann. Cas. 451, reversing Montgomery County v. Cochran (C. C.) 116 Fed. 985, and following the reasoning of In re Pennsylvania Co., 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738. See, also, Armstrong v. Kansas City Southern R. Co. (C. C.) 192 Fed. 608. *See "Removal of Causes," Dec. Dig. (Key-No.) § 68; Cent. Dig. §§ 122, 123.*

[57] Schwenk & Co. v. Strang, 59 Fed. 209, 8 C. C. A. 92; Collins v. Campbell (C. C.) 62 Fed. 850; Ellison v. Louisville & N. R. Co., 112 Fed. 805, 50 C. C. A. 530. *See "Removal of Causes," Dec. Dig. (Key-No.) § 91; Cent. Dig. § 202.*

[58] City of Detroit v. Detroit City R. Co. (C. C.) 54 Fed. 1; In re

to remove the case, which order should be filed in the state court.[59]

Then, if the plaintiff desires to contest the question of prejudice or local influence, he can do so by a motion to remand to the state court, on which the court will hear such evidence as it may think material.[60]

The present statute differs from the original act in requiring proof not merely that the defendant cannot obtain justice in the state where the suit is pending, but in any other state court to which he has the right to remove it. This qualifying clause, however, only applies where the plaintiff has the right to such change of venue in the state court, not where it is discretionary with the state court whether to allow the change of venue or not.[61]

The statute seems to draw a distinction between prejudice and local influence, and to allow removal for either of these two causes.[62]

It does not mean that the petitioner must prove, as an actual fact, that he cannot obtain justice. Such a requirement would practically make the law a dead letter. He need only prove the existence of such prejudice or local influence, not that the court or jury was actually affected by it.[63]

Proof that a decision in favor of the petitioner would affect the judge's chances of re-election has been held suffi-

Pennsylvania Co., 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738. *See "Removal of Causes," Dec. Dig. (Key-No.) § 91; Cent. Dig. § 202.*

[59] Pennsylvania Co. v. Bender, 148 U. S. 255, 13 Sup. Ct. 591, 37 L. Ed. 441. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 90, 91; Cent. Dig. § 202.*

[60] Dennison v. Brown (C. C.) 38 Fed. 535; Amy v. Manning (C. C.) 38 Fed. 868. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 63, 107; Cent. Dig. §§ 117, 178, 225–234.*

[61] Rike v. Floyd (C. C.) 42 Fed. 247; City of Tacoma v. Wright (C. C.) 84 Fed. 836; Parker v. Vanderbilt (C. C.) 136 Fed. 246. *See "Removal of Causes," Dec. Dig. (Key-No.) § 91; Cent. Dig. § 202.*

[62] Neale v. Foster (C. C.) 31 Fed. 53. *See "Removal of Causes," Dec. Dig. (Key-No.) § 63; Cent. Dig. § 117.*

[63] City of Tacoma v. Wright (C. C.) 84 Fed. 836. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 62, 63; Cent. Dig. §§ 116, 117.*

cient, and it applies whether the case is triable by a judge or a jury.[64]

The existence of such prejudice or local influence is enough to justify the removal, whether such feeling was, as a matter of fact, justified, under the circumstances, or not.[65]

REMOVAL BECAUSE OF STATE DENIAL OF EQUAL CIVIL RIGHTS

122. The denial of civil rights by state legislative authority gives the right of removal to the party so injured.

Section 31 of the Judicial Code provides as follows: "When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said state court at any time before the trial or final hearing of the cause, stating the facts

[64] City of Detroit v. Detroit City R. Co. (C. C.) 54 Fed. 1; Montgomery County v. Cochran (C. C.) 116 Fed. 985 (reversed on the jurisdictional question Cochran v. Montgomery County, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182, 4 Ann. Cas. 451). *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 62, 63; Cent. Dig. §§ 116, 117.*

[65] Bartlett v. Gates (C. C.) 117 Fed. 362. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 62, 63; Cent. Dig. §§ 116, 117.*

and verified by oath, be removed for trial into the next district court to be held in the district where it is pending. * * *[66]

The primary object of this provision was the protection of the colored race in the civil rights conferred upon them as a consequence of the Civil War. In its language, however, it is ample to cover any deprivation of equal civil rights, and is by no means limited to the colored race. The main rights which it is intended to cover, however, are those rights conferred by the fourteenth amendment, and the acts of Congress passed in pursuance thereof. The right to authorize removal from a state court by virtue of this statute is within the constitutional power of Congress.[66]

The essential principle to bear in mind under this section is that it alludes to state legislation, not to the mere practice or administration by state officers or courts of state laws which show no intent to discriminate upon their face. This has been repeatedly decided by the Supreme Court.

Strauder v. West Virginia[67] was a criminal prosecution against a colored man, removed by him under this act because the West Virginia statute provided upon its face that only white persons should be summoned as jurors. The court upheld the right of removal.

On the other hand, Virginia v. Rives[68] was a prosecution in a Virginia state court against a negro for murder. The Virginia laws regulating the summoning of jurors did not contain any provision limiting them to the white race, but it was charged that the uniform practice of the state

[66] Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664. *See "Removal of Causes," Dec. Dig. (Key-No.) § 2; Cent. Dig. § 3.*

[67] 100 U. S. 303, 25 L. Ed. 664. *See "Removal of Causes," Dec. Dig. (Key-No.) § 70; Cent. Dig. § 127; "Criminal Law," Cent. Dig. § 198.*

[68] 100 U. S. 313, 25 L. Ed. 667. See, also, Kentucky v. Powers, 201 U. S. 1, 26 Sup. Ct. 387, 50 L. Ed. 633, 5 Ann. Cas. 692, which contains a thorough review of the authorities. *See "Removal of Causes," Dec. Dig. (Key-No.) § 70; Cent. Dig. § 127.*

officers was to summon only white men upon the jury. The Supreme Court denied the right of removal in such case, because the discrimination was not by the state in its legislation, but by the officers of the state in their practice under it.

If the state legislation charged to bring about the discrimination is in form a dead letter, then the right of removal does not exist. In Neal v. Delaware [69] the Delaware Constitution of 1831, limiting the summoning of jurors to white persons, was still in force, but the Delaware courts had held that the amendments to the federal Constitution adopted after the war practically amended their state Constitution, also, although there had never been a state convention formally amending it. The Supreme Court held in such case that the right of removal did not exist.

In Bush v. Kentucky [70] the state act which attempted to discriminate in the summoning of jurors had been held by such court to be unconstitutional, but had never been formally repealed. The Supreme Court held that a petition to remove as to acts after the decision of the state Supreme court holding the law invalid could not be sustained.

Under this principle that the right is given only against state legislation, and not against the mere administration of the state law, there is no ground of removal under this act from the fact, even if proved, that there exists a personal or class prejudice against the obnoxious race. Such a case is not provided for where the parties are citizens of the same state.[71]

The fact that the state is suing in its own courts does not create any such inequality or denial of equal protection

[69] 103 U. S. 370, 26 L. Ed. 567. *See "Removal of Causes," Dec. Dig. (Key-No.) § 70; Cent. Dig. § 127.*

[70] 107 U. S. 110, 1 Sup. Ct. 625, 27 L. Ed. 354. *See "Removal of Causes," Dec. Dig. (Key-No.) § 70; Cent. Dig. § 127.*

[71] Gibson v. Mississippi, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075; Texas v. Gaines, Fed. Cas. No. 13,847. *See "Removal of Causes," Dec. Dig. (Key-No.) § 70; Cent. Dig. § 127.*

of its laws as to authorize the right of removal under this act.[72]

People of New York v. Bennett [73] reviews the decisions on this subject. It held that the New York statute of 1895 against bookmaking and pool selling in connection with horse racing did not constitute a denial of the equal protection of the laws, from the fact that it made things offenses if committed at one place, when they would not be if committed at another.

REMOVAL OF SUITS AGAINST OFFICERS OR PERSONS ENFORCING THE INTERNAL REVENUE LAWS

123. Suits in state courts, whether civil or criminal, against officers or others acting under federal authority in enforcing the revenue laws, are removable by them.

The first part of section 33 of the Judicial Code [74] provides as follows: "When any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer,

[72] State of Alabama v. Wolffe (C. C.) 18 Fed. 836. *See "Removal of Causes," Dec. Dig. (Key-No.) § 70; Cent. Dig. § 127.*

[73] (C. C.) 113 Fed. 515. *See "Removal of Causes," Dec. Dig. (Key-No.) § 70; Cent. Dig. § 127; "Criminal Law," Cent. Dig. § 198.*

[74] Act March 3, c. 231, 36 Stat. 1097 (U. S. Comp. St. Supp. 1911, p. 144).

and affects the validity of any such revenue law; or when any suit is commenced against any person for or on account of anything done by him while an officer of either house of Congress in the discharge of his official duty, in executing any order of such house, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the district court next to be holden in the district where the same is pending, upon the petition of such defendant to said district court."

The object of this statute is to protect federal officers in performing their duties under the revenue laws against suits in state courts, civil or criminal, on account of acts done while acting in that capacity. This provision is constitutional.[75]

It applies to suits commenced in a state court. When the proceeding is a criminal proceeding in which an indictment is necessary, it is not supposed to be commenced until an indictment has been found by the grand jury of the state. A preliminary examination before a magistrate under such circumstances cannot be removed, because it may be that, when sent on to the grand jury, an indictment would not be found, and it could not have been the intent of Congress to place on the federal grand juries the burden of finding indictments under state laws.[76]

There are, however, many cases which can be commenced without any indictment at all. For instance, under the criminal laws of Virginia, magistrates have original jurisdiction of a large class of misdemeanors, and try them as a court of original jurisdiction, not as a mere examining court. A prosecution of this sort against a federal officer for acts contemplated by the section above quoted is re-

[75] Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648. *See "Removal of Causes," Dec. Dig. (Key-No.) § 2; Cent. Dig. § 3.*

[76] Virginia v. Paul, 148 U. S. 107, 13 Sup. Ct. 536, 37 L. Ed. 386. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 21, 22; Cent. Dig. § 50.*

movable, though the magistrate's court may not be a court of record.[77]

The prosecutions removable from the state court are for acts as an officer of the United States in administering the revenue laws.[78]

It includes not only regular officers like marshals or deputy marshals, but soldiers of the army detailed to assist, or men summoned as a posse for the same purpose.[79]

It includes not only criminal prosecutions, but civil suits against federal officers to hold them liable for their acts as such in connection with the revenue laws. For instance, a suit is removable from the state court which sought to recover back taxes from a collector of internal revenue on the ground that they had been illegally assessed by him.[80]

It includes an action by a railroad company against a collector of customs for freight collected by his deputy from the consignees of goods passing through the custom-house, and in such case the federal court has jurisdiction to decide whether the collector is liable for the acts of his deputy under such circumstances.[81]

Suits in connection with those portions of the postal laws which look to the raising of revenue are removable. This would not include suits in connection with the money-order

[77] Commonwealth of Virginia v. Bingham (C. C.) 88 Fed. 561. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 21, 22; Cent. Dig. § 50.*

[78] Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648. Hence a suit against a federal officer acting under the reclamation act of June 17, 1902 (32 Stat. 388), is not removable, as it is not a revenue law. Twin Falls Canal Co. v. Foote (C. C.) 192 Fed. 583. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 21, 22; Cent. Dig. § 50.*

[79] Commonwealth of Virginia v. De Hart (C. C.) 119 Fed. 626; Davis v. South Carolina, 107 U. S. 597, 2 Sup. Ct. 636, 27 L. Ed. 574. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 21, 22; Cent. Dig. § 50.*

[80] Venable v. Richards, 105 U. S. 636, 26 L. Ed. 1196. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 21, 22; Cent. Dig. § 50.*

[81] Cleveland, C., C. & I. R. Co. v. McClung, 119 U. S. 454, 7 Sup. Ct. 262, 30 L. Ed. 465. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 21, 22; Cent. Dig. § 50.*

system, as that was not intended by Congress to be a means of raising revenue, but as a mere convenience.[82]

The suits in connection with those parts of the postal laws relating to the raising of revenue under them are removable.[83]

And a suit in a state court against contractors charged with the duty of building a government post office, and in connection with other acts as such contractors, is removable.[84]

The statute, however, does not authorize the removal of a suit against a United States commissioner to recover fees illegally exacted by him.[85]

Nor prosecutions in a state court for violation of the state liquor laws, though the accused may hold a federal liquor license. A license of this sort is not a license to violate state laws.[86]

The removal under this act is effectual when the federal court, by the process more fully set out in the statute, notifies the state court of the fact of removal.[87]

The effect of removing such a case is rather anomalous. The federal court tries the action as a prosecution under the laws of the state, and follows the construction of the

[82] U. S. v. Norton, 91 U. S. 566, 23 L. Ed. 454. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 21, 22; Cent. Dig. §§ 49–51.*

[83] Warner v. Fowler, Fed. Cas. No. 17,182; U. S. v. Bromley, 12 How. 88, 13 L. Ed. 905. See, as illustrating the principle, Bryant Bros. Co. v. Robinson, 149 Fed. 321, 79 C. C. A. 259; Lewis Pub. Co. v. Wyman (C. C.) 152 Fed. 200; People's U. S. Bank v. Goodwin (C. C.) 162 Fed. 937. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 21, 22; Cent. Dig. §§ 49–51.*

[84] Ward v. Congress Construction Co., 99 Fed. 598, 39 C. C. A. 669. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 21, 22; Cent. Dig. § 50.*

[85] Benchley v. Gilbert, Fed. Cas. No. 1,291. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 21, 22; Cent. Dig. § 50.*

[86] Com. v. Casey, 12 Allen (Mass.) 214. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 21, 22; Cent. Dig. § 50.*

[87] Virginia v. Paul, 148 U. S. 107, 13 Sup. Ct. 536, 37 L. Ed. 386. *See "Removal of Causes," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 204, 205.*

state law by the state court. If it is a prosecution in a state court for murder, then the question what constitutes murder or homicide is to be settled by the law of the state against whose sovereignty the act, if an offense at all, is an offense.[88]

In such case the prosecution in the federal court is conducted by the state prosecuting officers, and the federal prosecuting officers, if they take part at all, defend the accused, as he is setting up a defense under the federal law.[89]

[88] State of North Carolina v. Gosnell (C. C.) 74 Fed. 734. *See "Courts," Dec. Dig. (Key-No.) §§ 337, 359; Cent. Dig. §§ 908, 941.*

[89] State of Delaware v. Emerson (C. C.) 8 Fed. 411. *See "Removal of Causes," Dec. Dig. (Key-No.) § 70; Cent. Dig. § 127; "Criminal Law," Cent. Dig. § 198.*

CHAPTER XVI

THE DISTRICT COURT (Concluded)—JURISDICTION BY REMOVAL (Concluded)

124. Steps to Secure and Effect Removal—In General.
125. Form of Petition in General.
126. Place to File Petition.
127. Proper Averments in the Petition.
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STEPS TO SECURE AND EFFECT REMOVAL—IN GENERAL

124. The method of removing a cause is to file a petition in the state court showing on its face a removable case, accompanied by a proper bond. An order should then be obtained from the state court accepting the bond. A transcript of the record must be filed afterwards in the federal court. The refusal of the state court to enter such order does not defeat the right of removal.

Section 29 of the Judicial Code provides as follows:

"Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a state court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or

complaint of the plaintiff, for the removal of such suit into the district court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court."

Under this provision the only method of removal is by petition, and the necessity for filing a petition is jurisdictional. The case cannot be removed by consent, nor can a petition be waived by consent.[1]

[1] Hegler v. Faulkner, 127 U. S. 482, 8 Sup. Ct. 1203, 32 L. Ed. 210; First Nat. Bank v. Prager, 91 Fed. 689, 34 C. C. A. 51. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 86, 89; Cent. Dig. §§ 132, 166–179.*

FORM OF PETITION IN GENERAL

125. The petition must allege all necessary jurisdictional facts, and such facts must be alleged as existing both at the date of commencing the suit in the state court and at the date of filing the petition. A petition which does not make this allegation is defective.[2]

There is some conflict of authority on the question whether the petition must aver the necessary facts positively, or whether an averment on information and belief is sufficient.

In Wolff v. Archibald [3] it was decided that the averment of jurisdictional facts must be positive. On the other hand, in Carlisle v. Sunset Telephone & Telegraph Co.,[4] it was held that as the petitioner could not, in the nature of things, know the necessary facts positively of his own knowledge, an averment on information and belief was sufficient. This latter view seems to the author the more reasonable and correct one.

Under the former acts the petition was not required to be under oath, with some exceptions. But the present act requires it to be "duly verified." This will hardly be construed to mean the personal oath of the petitioner, being apparently intended somewhat as a pledge of good faith which counsel or local agents can give. In view of the short time allowed, it would often be difficult to secure the personal affidavit of a nonresident in time.

[2] Mattingly v. Northwestern Virginia R. Co., 158 U. S. 53, 15 Sup. Ct. 725, 39 L. Ed. 894; Dalton v. Milwaukee Mechanics' Ins. Co. (C. C.) 118 Fed. 936; Stevens v. Nichols, 130 U. S. 230, 9 Sup. Ct. 518, 32 L. Ed. 914. *See "Removal of Causes," Dec. Dig. (Key-No.) § 86; Cent. Dig. §§ 132, 166–179.*

[3] (C. C.) 14 Fed. 369. *See "Removal of Causes," Dec. Dig. (Key-No.) § 86; Cent. Dig. §§ 132, 166–179.*

[4] (C. C.) 116 Fed. 896. See, also, Holton v. Helvetia-Swiss Fire

Signature by Counsel

The petition need not be signed by the petitioner himself, but may be signed by his counsel.[5]

How far Record may Supplement Defective Petition

It has been stated above that the petition must show all the necessary jurisdictional facts. As a matter of good pleading, this should always be done, independent of the remainder of the record, as the court should be entitled to have the petitioner's case clearly and consecutively presented in a single paper without being put to the trouble of searching through the record. At the same time it is the result of the decisions that, though the petition itself may be defective in jurisdictional facts, yet if those facts appear from other parts of the record the case is removable.

In Reed v. Hardeman Co.[6] the petition averred that the amount involved was over $500, but the declaration showed that it was over $25,000. The court held that the case was removable under the act of August 13, 1888, though the averment of the petition itself did not show the necessary jurisdictional amount.

In National S. S. Co. v. Tugman[7] a petition was defective in not showing the alienage of one of the parties; but other parts of the record showed it, and the court held that the case was removable.

Ins. Co. of St. Gall, Switzerland (C. C.) 163 Fed. 659. *See "Removal of Causes," Dec. Dig. (Key-No.) § 86; Cent. Dig. §§ 132, 166–179.*

[5] Dennis v. Alachua Co., Fed. Cas. No. 3,791; Removal Cases, 100 U. S. 457, 25 L. Ed. 593. *See "Removal of Causes," Dec. Dig. (Key-No.) § 86; Cent. Dig. §§ 166–179.*

[6] 77 Tex. 165, 13 S. W. 1024. *See "Removal of Causes," Dec. Dig. (Key-No.) § 86; Cent. Dig. §§ 132, 175.*

[7] 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87. See, also, Denny v. Pironi, 141 U. S. 121, 11 Sup. Ct. 966, 35 L. Ed. 657; Powers v. Chesapeake & O. R. Co., 169 U. S. 92, 101, 18 Sup. Ct. 264, 42 L. Ed. 673; Kyle v. Chicago, R. I. & P. R. Co. (C. C.) 173 Fed. 238. *See "Removal of Causes," Dec. Dig. (Key-No.) § 86; Cent. Dig. §§ 166–179.*

How far Petition Amendable

This must be considered, first, as to the power of the state court to allow an amendment before the order of removal is entered, and, second, as to the power of the federal court after the transcript has been filed in the latter court.

As to the state courts, an amendment can certainly be allowed at any time before the lapse of the time prescribed by law within which the petition must be filed.[8]

It has also been held that the state court can allow the amendment of a petition even after the time within which the petition must be filed.[9]

On principle, there is no reason why a state court cannot allow an amendment at any time before it has entered the order of removal. If the case is a removable case, and the defect is merely in stating such facts, the party ought not to be deprived of his statutory right to remove by the omission of a statement of fact which existed at the time the petition was filed, although not set out in the petition.

The extent of the right to amend the petition for removal after it is filed in the federal court is not clear. Many cases hold that an entire failure to aver a removable case cannot be corrected by amendment, because, unless the petition shows a jurisdictional case, the state court has never lost its jurisdiction, and it is unfair to that court to try to make a new case in the federal court. Hence they hold that only defects in matters of form can be amended.[10]

The question turns largely on how far the Supreme Court meant to go in Kinney v. Columbia Savings & Loan

[8] Hardwick v. Kean, 95 Ky. 563, 26 S. W. 589; Security Co. v. Pratt, 65 Conn. 161, 32 Atl. 396. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 94, 107; Cent. Dig. § 178.*

[9] Roberts v. Pacific & A. R. & Nav. Co. (C. C.) 104 Fed. 577. *See "Removal of Causes," Dec. Dig. (Key-No.) § 94; Cent. Dig. § 178.*

[10] Shane v. Butte Electric R. Co. (C. C.) 150 Fed. 801; Wallenburg v. Missouri Pac. R. Co. (C. C.) 159 Fed. 217; Santa Clara County v. Goldy Mach. Co. (C. C.) 159 Fed. 750. *See "Removal of Causes," Dec. Dig. (Key-No.) § 94; Cent. Dig. § 178.*

Ass'n.[11] There the petition contained the general jurisdictional allegation as to citizenship of different states, but did not state this to be the fact at the commencement of the suit as well as at the filing of the petition. The lower court allowed this to be inserted by amendment, and the Supreme Court held that its action was correct, and that such an amendment was allowable. This was the only point directly involved, and the court was careful to limit its decision to "the power of the circuit court to permit amendments of pleadings to show diverse citizenship, and of removal proceedings where there is a technical defect and there are averments sufficient to show jurisdiction." But the opinion also quotes approvingly older decisions which allowed an allegation of residence to be changed to one of citizenship; and it has always been held that an allegation of residence was not sufficient to give jurisdiction. But, notwithstanding this, it is the preponderant, and better opinion that a petition which shows no jurisdiction at all and is not helped out by other parts of the record is too defective to amend.

PLACE TO FILE PETITION

126. Sections 29, 30 and 31 of the Judicial Code require the petition for removal to be filed in the state court in the following cases:

(a) Suits by the United States or any officer thereof.

(b) Suits between citizens of the same state claiming under land grants from different states.

[11] 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103. See, also, as examples of amendments, Flynn v. Fidelity & Casualty Co. (C. C.) 145 Fed. 265; Muller v. Chicago, I. & L. R. Co. (C. C.) 149 Fed. 939; Wilbur v. Red Jacket Consol. Coal & Coke Co. (C. C.) 153 Fed. 662; De La Montanya v. De La Montanya (D. C.) 158 Fed. 117; Kyle v. Chicago, R. I. & P. R. Co., 173 Fed. 238. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 94, 107; Cent. Dig. § 178.*

(c) Cases turning on federal questions.
(d) Cases turning on the citizenship of the parties.
(e) Cases turning on the citizenship of the parties and removed as separable controversies.
(f) Cases turning on a denial of equal civil rights.

Under sections 28 and 33 of the Judicial Code, the petition to remove must be filed in the district court of the United States:

(a) When the ground of removal is prejudice or local influence.
(b) When it is a suit or prosecution against revenue officers, etc.

PROPER AVERMENTS IN THE PETITION

127. A petition for removal under any one of the various classes of removal cases must show in its averments all the necessary facts to entitle the petitioner to a removal on the particular ground relied on.

When the Ground is the Existence of a Federal Question

In order to ascertain the proper allegations in such a petition, it is necessary to compare the twenty-fourth section of the Judicial Code regulating the original jurisdiction of the court, with the twenty-eighth section, regulating its jurisdiction by removal. When this comparison is made, it will be seen that the petition ought to show the character of the suit, so as to show that it is a suit of a civil nature, at law or in equity, of which the court would have original jurisdiction, thus excluding proceedings by mandamus and other proceedings which, as shown in a previous connection, cannot be brought originally in the federal courts. The petition then ought to show that the suit arises under the "Constitution and laws of the United States, or treaties made or which shall be made under their

authority." Prior to the act of August 13, 1888, it was essential to show this by the petition, at least in those cases where it did not appear on the plaintiff's pleading, for under the prior acts a suit could be removed, as involving such a question, where the question was raised for the first time by the defendant's pleading; but it has been seen that under the present act the plaintiff's pleading must show the existence of a federal question upon its face before the case is removable at all.[12] Hence, while it is better pleading, and due the court, to state not merely in general terms that the case arises under the Constitution and laws of the United States, or treaties made or which shall be made under their authority, but also to state exactly what the question is and how it arises; still a failure to do this would not be fatal, because it would necessarily appear on the plaintiff's own pleading, and hence would come under the principle above described, that the petition may be supplemented by other parts of the record.[13]

The petition should conclude with the prayer for removal, and have the bond attached.

Averments Necessary When the Application is to Remove the Entire Controversy on the Ground of Citizenship, etc.

In this class of cases the form of the petition is necessarily more important, for it is the petition which shows that the case is a removable case, and not the other parts of the record. In an ordinary case in a state court it is no part of any system of pleading to set out the citizenship of the parties. Hence the record in this case must be

[12] Minnesota v. Northern Securities Co., 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870. *See "Removal of Causes," Dec. Dig. (Key-No.) § 86; Cent. Dig. §§ 132, 166–179.*

[13] But there are strong decisions to the effect that the petition must not merely aver the existence of a federal question in general terms, but must state facts necessary to show that such a question is involved and how it arose. City of New Castle v. Postal-Telegraph Cable Co. (C. C.) 152 Fed. 572; Rural Home Tel. Co. v. Powers (C. C.) 176 Fed. 986. *See "Removal of Causes," Dec. Dig. (Key-No.) § 86; Cent. Dig. §§ 132, 166–179.*

supplemented by proper averments in the petition itself, and the pleader cannot ordinarily hope to fall back upon the other parts of the record to help him out.

The twenty-fourth section of the Judicial Code, regulating jurisdiction, and the twenty-eighth section, regulating removals, must be read together in order to see the necessary averments. Reading them together, it will be seen that the petition ought to show the character of the suit, whether at law or in equity, and that it is one of which the district court would have original jurisdiction. It ought to show the amount involved, and the citizenship of each of the parties at the time of the commencement of the suit and at the time of filing the petition. In addition, as only the nonresident defendant can remove, it ought to show the residence or habitation of each party, both plaintiff and defendant; and, if it is a suit by the assignee, it ought to show the same as to the assignor. But where these facts appear in other parts of the record, in such case an omission to allege these facts would be supplemented by the record. But still the petition ought to collate all these facts for the convenience of the court.[14]

It is not sufficient to allege merely that the plaintiffs and defendants are citizens of different states, but the citizenship of each one must be given.[15]

Same—Corporations

These are the general rules as to the drafting of the petition. There are, however, many instances where general allegations are tantamount to the allegations stated to be necessary above. Most of these questions arise in connection with the proper averments as to the legal status of corporations. The general principles discussed in ref-

[14] Hall v. Tevis (C. C.) 177 Fed. 600; Katalla Co. v. Rones, 186 Fed. 30, 108 C. C. A. 132. *See "Removal of Causes," Dec. Dig. (Key-No.) § 86; Cent. Dig. §§ 132, 166–179.*

[15] Cameron v. Hodges, 127 U. S. 322, 8 Sup. Ct. 1154, 32 L. Ed. 132. *See "Removal of Causes," Dec. Dig. (Key-No.) § 86; Cent. Dig. §§ 166–179.*

erence to the proper allegations in original suits [16] apply to such circumstances.

In the case of an alien corporation, for instance, an allegation that the corporation is organized under the laws of a certain foreign country is, in law, equivalent to the allegation that this was the state of facts both at the commencement of the suit and the filing of the petition for removal, for it speaks of the date of creation.[17]

The principle that a corporation must not be alleged to be a citizen, and that such an allegation is meaningless, applies as well to removal cases as to original cases.[18]

An allegation that the corporation is organized under the laws of a certain state, and has its principal office at a certain place in said state, is a sufficient allegation both of citizenship and residence,[19] though, for safety's sake, an allegation that such was the state of facts both at the commencement of the suit and the filing of the petition would be a wise addition.

In some cases it has been held that, in making the proper allegations as to a corporation, it should be stated not only that it is a citizen of a given state, with its principal office in that state, but also that it is not a citizen of the state where the suit is pending. The reason given for this decision is that a corporation may be a citizen of more than one state, and that this possibility ought to be excluded.[20]

On the other hand, it has been held that an allegation

[16] Ante, p. 248 et seq.

[17] Continental Wall-Paper Co. v. Lewis Voight & Sons Co. (C. C.) 106 Fed. 550. *See "Removal of Causes," Dec. Dig. (Key-No.) § 86; Cent. Dig. §§ 166–179.*

[18] Dinet v. Delavan (C. C.) 117 Fed. 978. *See "Removal of Causes," Dec. Dig. (Key-No.) § 86; Cent. Dig. §§ 166–179.*

[19] Ante, p. 250.

[20] Overman Wheel Co. v. Pope Mfg. Co. (C. C.) 46 Fed. 577. *See "Removal of Causes," Dec. Dig. (Key-No.) § 86; Cent. Dig. §§ 166–179.*

that it is a corporation of a certain state, with its principal office in that state, is sufficient.[21]

It seems to the author that this latter class of authorities is best based on reason. A study of the Supreme Court decisions in relation to corporations holding charters or permissive legislation from more than one state will show that a corporation cannot be a citizen of two states. On the contrary, those cases have held that where a corporation is chartered simultaneously by two states, and keeps but one set of books, one set of officers, and one organization, still, in contemplation of law, they are two entirely distinct and separate corporations. Hence an averment that a corporation was organized under the laws of a certain state, with its principal office in that state, would be tantamount to the averment that it was the corporation which was bringing the suit, and this ought to be sufficient.[22] If this were not true, certainly an allegation to the above effect ought to be sufficient to make a prima facie case, and to put on any party who should question it the onus of denying it.

Averment of Residence

As to a corporation, an averment that it is organized under the laws of a certain state, with its principal office in that state, is equivalent to an averment of residence in that state.[23]

[21] Myers v. Murray, Nelson & Co. (C. C.) 43 Fed. 695, 11 L. R. A. 216; Shattuck v. North British & Mercantile Ins. Co., 58 Fed. 609, 7 C. C. A. 386; Wilcox & Gibbs Guano Co. v. Phœnix Ins. Co. (C. C.) 60 Fed. 929. *See "Removal of Causes," Dec. Dig. (Key-No.) § 86; Cent. Dig. §§ 166–179.*

[22] Nashua & L. R. Corp. v. Boston & L. R. Corp., 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. Ed. 363. *See "Courts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 860; "Removal of Causes," Dec. Dig. (Key-No.) § 86; Cent. Dig. §§ 166–179.*

[23] Howard v. Gold Reefs of Georgia (C. C.) 102 Fed. 657; Baumgarten v. Alliance Assur. Co., Limited, of London (C. C.) 153 Fed. 301. *See "Removal of Causes," Dec. Dig. (Key-No.) § 86; Cent. Dig. §§ 166–179.*

In reference to such an averment as among individuals, it was held in Fife v. Whittell [24] that, as only a nonresident defendant could remove, there must be an express averment in the petition that the defendant is a nonresident, though there is already an express averment that the defendant is a citizen and resident of a certain state, different from the one where the suit was instituted.

On the other hand, in Zebert v. Hunt [25] it was held that an allegation of citizenship and residence in another state was sufficient to show nonresidence. To the author it seems that it certainly ought to be sufficient. If a suit is brought in the Eastern District of Virginia, and the petition alleges that the defendant is a citizen and resident of the state of New York, it would seem hypercritical in the extreme to require him to go on and allege further that he was not a resident of the state of Virginia. Something might be left for the court to presume.

Allegations Necessary in Removals on the Ground of Separable Controversies

As the plaintiff's own petition must show that the plaintiff's controversy is separable, this allegation is not essential, but should be inserted for the reasons given in previous connections. Hence the petition in such case ought to show the character of suit, the amount, the citizenship of the parties to the controversy, alleged in accordance with the rules given in the last connection, and sufficient to show that the defendant is a nonresident defendant. Of course, as in all other cases, there should be a prayer for removal and a proper bond.

[24] (C. C.) 102 Fed. 537. But such an averment would be necessary as to an alien defendant, since an alien may still be a resident. Mayer v. Karaghuesian (C. C.) 169 Fed. 736. *See "Removal of Causes," Dec. Dig. (Key-No.) § 86; Cent. Dig. §§ 166–179.*

[25] (C. C.) 108 Fed. 449. See, also, Lawrence v. Southern Pac. Co. (C. C.) 165 Fed. 241; Harding v. Standard Oil Co. (C. C.) 182 Fed. 421. *See "Removal of Causes," Dec. Dig. (Key-No.) § 86; Cent. Dig. §§ 166–179.*

Allegations When the Ground is Prejudice or Local Influence

This petition, as shown above, goes to the United States district court. As there is no record in that court to help out the petition, it must be prepared with special care. It must show the character of the suit, the amount involved, the citizenship and residence of both parties as detailed above, and the facts which are claimed to show the existence of prejudice or local influence. A mere allegation that such prejudice or local influence exists would not be sufficient, but the petition should set out wherein the prejudice or local influence is supposed to exist. It is a delicate matter for a judge to remove a suit from another court on such a ground, and the petitioner must expect that the first impulse of the federal judge in such case will be a negative, and must make his strongest allegations to meet it. It should be accompanied by affidavits or other proof sufficient to make such a case appear to the court.[26]

Removal on Ground of Denial of Civil Rights

In this case the amount and citizenship are immaterial. The petition under such circumstances should show the character of the suit or prosecution, show the right denied, and state the facts constituting the denial, and an affidavit is necessary.

Removal on Ground of Prosecution of Revenue Officers

The petition in this case must be filed in the federal court, and, as there is no record in this court at the time of its filing, it must necessarily be full. It must show the nature of the suit or prosecution, and have a certificate of an attorney or counselor who appears in the court when the suit or prosecution is commenced, or in the United States court, stating that, as counsel for the petitioner, he has examined the proceedings, and carefully inquired into

[26] City of Detroit v. Detroit City R. Co. (C. C.) 54 Fed. 1. *See "Removal of Causes," Dec. Dig. (Key-No.) § 87; Cent. Dig. §§ 180–183.*

all the matters set forth in the petition, and believes them to be true. The petition must be verified by affidavit.

THE REMOVAL BOND

128. In order to effect a removal, the petitioner is required to file a bond, with proper surety, to insure the transfer on his part of the record in the case to the proper federal court at the proper time, and to cover all costs incident to the removal of the case.

Section 29 of the Judicial Code requires, in reference to the main sources of jurisdiction by removal, that with the petition the petitioner shall file a bond, "with good and sufficient surety, for his or their entering in such district court within thirty days from the date of filing said petition a copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein."

This bond is not an ordinary court bond, and the word "bond" is not used in the sense of a writing obligatory, and it need not be executed by the party asking the removal nor be accompanied by a power of attorney when signed by an agent.[27]

In the Removal Cases [28] the Supreme Court approved a bond not under seal and signed with the plaintiff's name by

[27] Removal Cases, 100 U. S. 457, 25 L. Ed. 593; Loop v. Winter's Estate (C. C.) 115 Fed. 362; People's Bank of Greenville v. Ætna Ins. (C. C.) 53 Fed. 161; Mutual Life Ins. Co. of New York v. Langley (C. C.) 145 Fed. 415; Fayette Title & Trust Co. v. Maryland P. & W. V. Telephone & Telegraph Co. (C. C.) 180 Fed. 928. *See "Removal of Causes," Dec. Dig. (Key-No.) § 88; Cent. Dig. §§ 184–188.*

[28] 100 U. S. 457, 25 L. Ed. 593. *See "Removal of Causes," Dec. Dig. (Key-No.) § 88; Cent. Dig. §§ 184–188.*

his attorneys. A defect in a bond is not jurisdictional, but the court may allow it to be amended, or a new one to be substituted.[29]

The statute does not name any fixed amount as a penalty. There is some difference of opinion among the courts whether a bond should name a penalty or not. It would seem to be the correct practice to name a penalty, but the penalty named should be sufficiently large to cover all possible costs in the event of a remand; and, if it is, the better opinion is that the bond would be in proper form.[30]

TIME OF FILING PETITION

129. The petition for removal must be filed at or before the time when the defendant is required by the laws of the state, or the rule of the state court in which the suit is brought, to first answer or plead to the declaration or complaint of the plaintiff. But the question of the time of filing the petition is not one of jurisdiction, but merely modal or formal, and may be waived.

In the cases covered by the twenty-eighth section of the Judicial Code, except removals on the ground of prejudice or local influence, the statute requires that the defendant may make and file a petition in such suit in such state court at the time or any time before the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff. This is quite a departure

[29] Overman Wheel Co. v. Pope Mfg. Co. (C. C.) 46 Fed. 577; Ayres v. Watson, 113 U. S. 594, 5 Sup. Ct. 641, 28 L. Ed. 1093; Chase v. Erhardt (D. C.) 198 Fed. 305. *See "Removal of Causes," Dec. Dig. (Key-No.) § 88; Cent. Dig. §§ 184–188.*

[30] Commonwealth v. Louisville Bridge Co. (C. C.) 42 Fed. 241; Johnson v. F. C. Austin Mfg. Co. (C. C.) 76 Fed. 616; Groton Bridge Co. v. American Bridge Co. (C. C.) 137 Fed. 284. *See "Removal of Causes," Dec. Dig. (Key-No.) § 88; Cent. Dig. §§ 184–188.*

from the policy of the earlier acts, which allowed a longer time within which to file the petition. At the same time, the question of the time of filing the petition is not one of jurisdiction, but is, as has been said more than once, merely modal and formal. Hence it is a requirement which may be waived either by direct consent or by conduct. The plaintiff who wishes to contend that the petition has not been filed in time must act promptly. If he goes to trial on the merits, or contests the right of removal on other grounds, he waives this right.[31]

Nor can this question be raised for the first time in an appellate court.[32]

The question when the petition should be filed depends upon the statutes and practice of the different states. But the petition must be filed when the defendant is required to put in any defense to the complaint, whether of a dilatory character or to the merits. If, under the practice of the state court, dilatory pleas must be filed at an earlier date than pleas to the merits, then the defendant must file his petition at the time when the dilatory plea is due.[33]

Rule in Case of Extension of Time

The question whether an extension of time within which the defendant shall answer extends the time for filing the petition is one in which the decisions are in great conflict. In the New York circuit it is held that such an extension does extend the time for filing the petition.[34]

[31] Guarantee Co. of North Dakota v. Hanway, 104 Fed. 369, 44 C. C. A. 312; Martin v. Baltimore & O. Ry. Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; Kansas City, Ft. S. & M. R. Co v. Daughtry, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 963. *See "Removal of Causes," Dec. Dig. (Key-No.) § 81; Cent. Dig. §§ 137, 138.*

[32] Knight v. International & G. N. R. Co., 61 Fed. 87, 9 C. C. A. 376; Newman v. Schwerin, 61 Fed. 865, 10 C. C. A. 129. *See "Removal of Causes," Dec. Dig. (Key-No.) § 81; Cent. Dig. § 137.*

[33] MARTIN v. RAILWAY CO., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; A. Overholt & Co. v. German-American Ins. Co. (C. C.) 155 Fed. 488. *See "Removal of Causes," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 135–160.*

[34] Lord v. Lehigh Val. R. Co. (C. C.) 104 Fed. 929; Dancel v. Good-

There is, however, highly respectable authority the other way.[35]

The decisions in the different districts on this point are necessarily largely influenced by the practice of the states in which the decisions are rendered. The case of Martin v. Baltimore & O. Ry. Co., above cited, seems to establish that the petition must be filed before any judgment of default, even conditional in its nature, is entered against the defendant. Hence, on principle, the proper doctrine appears to be that if, at the time the extension is granted, no judgment by default has been entered against the defendant, and if the effect of the extension is that no judgment by default can be entered until the period of extension expires, then the defendant can file his petition during such extension. But if a judgment by default has to be set aside in order to grant the extension, it would be too late.

In Chiatovich v. Hanchett[36] the court held that an extension by stipulation of parties, without any court order, extended the time for filing the petition. This apparently is going too far, as the question is determined, under the language of the statute, not by special interchanges of courtesies among counsel, or by orders in special cases, but by the general laws or rules of the state court. No better test can be laid down as to the general provision than the language of the statute itself. If, under the state practice, the defendant is required, first, whether there is

year Shoe Mach. Co. (C. C.) 106 Fed. 551. See, also, Avent v. Deep River Lumber Co. (C. C.) 174 Fed. 298; Higson v. North River Ins. Co. (C. C.) 184 Fed. 165. *See "Removal of Causes," Dec. Dig. (Key-No.) § 79; Cent. Dig. § 144.*

[35] Fox v. Southern R. Co. (C. C.) 80 Fed. 945. See, also, Heller v. Ilwaco Mill & Lumber Co. (C. C.) 178 Fed. 111; Wayt v. Standard Nitrogen Co. (C. C.) 189 Fed. 231. *See "Removal of Causes," Dec. Dig. (Key-No.) § 79; Cent. Dig. § 144.*

[36] (C. C.) 78 Fed. 193. See, also, Tevis v. Palatine Ins. Co. of London, England (C. C.) 149 Fed. 560. *See "Removal of Causes," Dec. Dig. (Key-No.) § 79; Cent. Dig. § 144.*

any extension or not, to plead to the declaration or complaint, whether that plea be dilatory or peremptory, then he must file his petition when such plea is due. If the effect of the extension under the state practice is under the general rules of practice of that state, and not under special agreement of counsel, to extend the time within which he is first required to plead any sort of plea on pain of a default judgment, whether conditional or absolute, then the effect of the extension would be to extend the right of filing the petition. This seems to the author the meaning of the statute.

It has well been held that a party who is not served with process, and only appeared on condition that he should answer within a certain length of time, could file his petition during that time, though it extended the period beyond the time when he would have had to make defense, had he been served.[87]

If the service is void, the time does not run from such service, and the petition may be filed even after a judgment by default, for the judgment by default is void itself if the service is void.[88]

In proceedings against a nonresident on attachment and by publication, many state codes provide that the defendant may appear within a given time, if he has not been served with process, set aside the judgment, and defend the case.

Under the act of 1875, which required the petition to be filed before the first term at which the case could be tried, the Supreme Court held that a nonresident defendant who appeared after the term and set aside the default could file his petition.[89]

[87] Tracy v. Morel (C. C.) 88 Fed. 801. *See "Removal of Causes," Dec. Dig. (Key-No.) § 79; Cent. Dig. § 144.*

[88] Tortat v. Hardin Min. & Mfg. Co. (C. C.) 111 Fed. 426. *See "Removal of Causes," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 141–146.*

[89] Harter Tp. v. Kernochan, 103 U. S. 562, 26 L. Ed. 411. *See*

The principle of this decision applies to the present act. A proceeding by attachment, not accompanied with personal service, is void, except as regards the property attached; being in the nature of an action in rem. This being the case, the defendant is not in court personally on such proceeding, and when he comes into court he comes with all of the rights which he would have had in an ordinary personal suit.

Removals on Amended Declaration or Complaint

It frequently happens that the original complaint of the plaintiff does not show a removable case, as when it makes parties who would defeat the jurisdiction. Subsequent thereto the plaintiff, by dismissing his suit as to some of the defendants, or by filing an amended petition showing on its face some ground of removal, changes the character of the case. There was for a time considerable conflict among the authorities whether a change of this sort would give the right to remove a case on an amended petition, when it did not first exist. It had been held that, where the amendment raised the amount involved to the jurisdictional amount, then a petition to remove could be filed within the time when the petitioner was first required to answer the amended petition.[40]

A recent decision of the Supreme Court, however, has put the matter at rest, and held that, where the amended petition made a removable case which did not exist before, the right of removal could be exercised within the time required to plead to the amended petition.[41]

"Removal of Causes," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 141–146.

[40] Huskins v. Railroad Co. (C. C.) 37 Fed. 504, 3 L. R. A. 545. *See "Removal of Causes," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 141–146.*

[41] Powers v. Chesapeake & O. R. Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673; Jones v. Mosher, 107 Fed. 561, 46 C. C. A. 471; Fritzlen v. Boatmen's Bank, 212 U. S. 364, 29 Sup. Ct. 366, 53 L. Ed. 551. *See "Removal of Causes," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 141-146.*

This principle, however, only applies where the petition itself or the voluntary act of the plaintiff shows a removable case. A decision by the court dismissing the case as to one of the two defendants on the merits does not result in allowing the other defendant to remove.[42]

Removals in Vacation of State Court

Interesting and conflicting questions of practice arise when the petition is filed during the vacation of the state court. For instance, under the Virginia practice the time when the defendant is first required to plead is at a rule day, and while the case is "at rules," as it is usually designated. The rules are kept by the clerk, and the judge has no control over proceedings at rules until the case goes on the trial docket. Under this practice, the petition must be filed at rules—that is, in the clerk's office, before the clerk—and the judges ordinarily refuse to enter any order, because they contend that, under the state practice, they have no power while the case is at rules. At the same time, a case cannot well be removed until the court, as a court, has an opportunity to pass upon the question whether the petition makes a removable case, and whether the bond is sufficient. Under these circumstances, the proper practice is to file the petition at rules, and at the next term of the court to bring it to the attention of the court, and ask the removal order to be entered.[43]

If, however, the state judge has power to act at rules or in vacation, this removes the case, without any further order in court.[44]

[42] Whitcomb v. Smithson, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303, and the comments thereon in Alabama Great Southern R. Co. v. Thompson, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147. *See "Removal of Causes," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 141–146.*

[43] Monroe v. Williamson (C. C.) 81 Fed. 977; Hall v. Chattanooga Agricultural Works (C. C.) 48 Fed. 599; Fox v. Southern R. Co. (C. C.) 80 Fed. 945; Mays v. Newlin (C. C.) 143 Fed. 574. *See "Removal of Causes," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 204, 205.*

[44] Mecke v. Valley Town Mineral Co., 93 Fed. 697, 35 C. C. A. 151. *See "Removal of Causes," Dec. Dig. (Key-No.) § 79.*

Time of Filing Petition in Removals on Ground of Prejudice or Local Influence or for Denial of Civil Rights, or Suits against Revenue Officials

In removals on the ground of prejudice or local influence, the statute requires that the petition, which in this case is filed in the United States district court, shall be filed "at any time before the trial thereof." This means the first trial, and consequently the application would be too late after a mistrial.[45]

In removals on the ground of denial of civil rights, the petition must be filed in the state court "at any time before the trial or final hearing of the cause," and in suits against revenue officers it must be filed "at any time before the trial or final hearing thereof." In these cases, under the meaning given these words in previous acts, the petition could be filed even after a mistrial, because that would still be before the trial or final hearing.[46]

In these two latter cases it must be filed before the trial is commenced. In Yulee v. Vose [47] it was held that the trial had not commenced, though the jury was sworn, and that a petition filed after the jury was sworn was in time.

STEPS AT FILING OF PETITION

130. When the petition is to be filed in the state court, the procedure is to take the petition and bond and present it to the judge, if it is a case where it must be filed in open court, or file it in the clerk's office, where that is the proper place. If presented to

[45] Fisk v. Henarie, 142 U. S. 459, 12 Sup. Ct. 207, 35 L. Ed. 1080; McDonnell v. Jordan, 178 U. S. 229, 20 Sup. Ct. 886, 44 L. Ed. 1048. *See "Removal of Causes," Dec. Dig. (Key-No.) § 80; Cent. Dig. § 160.*

[46] Home Life Ins. Co. v. Dunn, 19 Wall. 214, 22 L. Ed. 68; Baltimore & O. R. Co. v. Bates, 119 U. S. 464, 7 Sup. Ct. 285, 30 L. Ed. 436. *See "Removal of Causes," Dec. Dig. (Key-No.) § 79.*

[47] 99 U. S. 539, 25 L. Ed. 355. *See "Removal of Causes," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 139–160.*

the judge, he ought to be requested to sign an order of removal. If filed in the clerk's office, the judge ought to be requested at the next term to sign such an order.

Where the removal is on the ground of prejudice or local influence, the petition, as has been seen, is filed in the federal court, and it must be made to appear to that court that this ground of removal exists.

The removal acts prior to the Judicial Code contained no provision requiring notice of intent to remove, though some cases had held that it should be given as a matter of proper practice, especially in cases based on prejudice and local influence.[48] But section 29 of the Judicial Code requires that "written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same."

This however applies only to cases removed under the twenty-eighth section, and even as to them, excludes cases removed on the ground of prejudice and local influence. The provision is not jurisdictional, but it is one of substance unless waived.[49]

As has been seen, the cases covered by section 28 include the great majority of removable cases. Section 30, relating to removals under conflicting state land grants, does not in terms require notice, but the proceedings to remove in that case are in court, so that parties are presumed to have notice.

Section 31, regulating removals on the ground of denial of equal civil rights, and section 33, regulating removals of suits under revenue laws, do not require notice.

[48] Creagh v. Equitable Life Assur. Soc. of United States (C. C.) 83 Fed. 849; Ashe v. Union Cent. Life Ins. Co. (C. C.) 115 Fed. 234; Schwenk & Co. v. Strang, 59 Fed. 209, 8 C. C. A. 92. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 84, 85; Cent. Dig. § 164.*

[49] Goins v. Southern Pac. Co. (D. C.) 198 Fed. 432. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 85, 103; Cent. Dig. §§ 164, 221.*

The statute does not state what notice is required or how it is to be served. As the petition must often be filed very soon after suit brought in order to be in time, this is apt to become a very practical question where the plaintiff is a nonresident and represented by nonresident counsel.

When the petition is presented to the state court, it has the right to consider and pass upon the question whether the petition upon its face shows a removable case. It has not, however, the right to try any question of fact bearing on the question of jurisdiction, for it is, under the language of the statute, the duty of the court to accept the petition and bond and proceed no further in the suit, and the federal court alone can try the questions of jurisdiction depending on the facts, and not appearing on the face of the petition.[50]

While it is made the duty of the state court to accept the petition and bond, and that it should enter an order doing so, its failure to enter such an order does not defeat the right of removal, but the petitioner can take his transcript of the record and file it, and the federal court will obtain jurisdiction of the case.[51]

If a state court should attempt to exercise jurisdiction after a petition is filed showing a removable case, the federal court would enjoin the parties therein from proceeding.[52]

[50] STONE v. SOUTH CAROLINA, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 29 Sup. Ct. 430, 53 L. Ed. 765; Texas & P. R. Co. v. Eastin & Knox, 214 U. S. 153, 29 Sup. Ct. 564, 53 L. Ed. 946. *See "Removal of Causes," Dec. Dig. (Key-No.) § 89; Cent. Dig. §§ 189–201.*

[51] Loop v. Winter's Estate (C. C.) 115 Fed. 362; Mannington v. Hocking Val. R. Co. (C. C.) 183 Fed. 133; Stevenson v. Illinois Cent. R. Co. (C. C.) 192 Fed. 956. *See "Removal of Causes," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 204, 205.*

[52] Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462; Donovan v. Wells Fargo & Co., 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250. *See "Courts," Dec. Dig. (Key-No.) § 508; Cent. Dig. § 1430; "Removal of Causes," Cent. Dig. § 209.*

If the state court enters an order denying the removal, the petitioner can reserve an exception, and still remove his case to the federal court; and his remaining in the state court after such reservation of his right is not a waiver of his right of removal.[53]

In such case the petitioner may take an exception to the refusal of the state court, and then remain in the state court, fight the case out, and take a writ of error from the Supreme Court direct to the court of last resort of the state, under section 237 of the Judicial Code, giving such right.[54]

Or he may remain in the state court, fight the case there, and also take the case to the federal court and fight it there at the same time, and such action will not be a waiver of his rights.[55]

But if, after the petition is filed, the state court dismisses as to the removing defendants, the other parties who remain and fight the case out cannot question its jurisdiction.[56]

If the removal is to the wrong federal court, this mistake is a jurisdictional one, and the court does not acquire cognizance of the case.[57]

[53] Kirby v. Chicago & N. W. R. Co. (C. C.) 106 Fed. 551; Remsen v. C. F. Blanke Tea & Coffee Co. (C. C.) 189 Fed. 418. *See "Removal of Causes," Dec. Dig. (Key-No.) § 17; Cent. Dig. § 10; "Courts," Cent. Dig. § 150.*

[54] STONE v. SOUTH CAROLINA, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962. *See "Removal of Causes," Dec. Dig. (Key-No.) § 97; Cent. Dig. §§ 206, 207.*

[55] Kern v. Huidekoper, 103 U. S. 485, 26 L. Ed. 354; CHESAPEAKE & O. RY. CO. v. WHITE, 111 U. S. 134, 4 Sup. Ct. 353, 28 L. Ed. 378; Hickman v. Missouri, K. & T. R. Co. (C. C.) 97 Fed. 113. *See "Removal of Causes," Dec. Dig. (Key-No.) § 17; Cent. Dig. § 10.*

[56] Anderson v. United Realty Co., 222 U. S. 164, 32 Sup. Ct. 50, 56 L. Ed. 144. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 17, 89; Cent. Dig. § 10.*

[57] In re State Ins. Co., 18 Wall. 417, 21 L. Ed. 904. *See "Removal of Causes," Dec. Dig. (Key-No.) § 14; Cent. Dig. § 35.*

FILING AND SUBSEQUENT PROCEDURE IN FEDERAL COURT

131. In the great majority of removable cases the act requires a transcript of the record to be filed in the district court in the district where the suit is pending, and within thirty days from the date of filing the petition. This means the federal court of the district which includes territorially the state court where the suit is pending at the time of removal. The place where the suit originated does not affect the question.[58] The jurisdiction of the federal court vests as of the time of filing the petition in the state court.

Under section 29 of the Judicial Code, the cases covered by the twenty-eighth section, which are the vast majority of those met in practice, must be removed by filing the transcript of the record in the federal court "within thirty days from the time of filing said petition" in the state court, except as to cases based on prejudice and local influence. This is quite a change from the earlier acts, which required the record to be filed in the federal court "on the first day of its then next session." But cases removable because turning on conflicting state land grants, those removable as turning on the denial of equal civil rights, and those turning on the revenue law section must be removed "for trial to the district court of the United States next to be holden in said district."

The jurisdiction of the federal court attaches as of the date of filing the petition in the state court. Even during the interval between the filing of the petition in the state court and the transcript of the record in the federal court,

[58] Hess v. Reynolds, 113 U. S. 73, 5 Sup. Ct. 377, 28 L. Ed. 927. *See "Removal of Causes," Dec. Dig. (Key-No.) § 92; Cent. Dig. § 190.*

the latter has jurisdiction, and will make any orders necessary for the preservation of the property, etc.[59]

There is some difference in the decisions on the question whether the federal court during this interval has sufficient jurisdiction to preserve the property and enter preliminary orders, or whether it has jurisdiction over the whole case. The rational view is taken by Judge Severens in Torrent v. S. K. Martin Lumber Co.[60] In it he says that there is no intermediate state during which neither court has jurisdiction, but that the federal court has full jurisdiction over the subject; that, in the exercise of its jurisdiction, it must regard the established rules and practice, but that questions as to hearing the case too soon, or matters of that sort, are questions of procedure, and not of jurisdiction.

No formal order of the federal court placing the case on the docket is required. It need simply be filed, and, under the older acts it was held that, though it is filed before the first day of the term, it takes effect as of the first day, if on file at that time.[61]

Further Pleadings

Although, as Judge Severens says, there is no intermediate state between the two courts, as far as jurisdiction is concerned, and the jurisdiction of the federal court attaches as soon as the petition is filed in the state court, there is an intermediate state of the case in one respect, and that is in reference to the pleadings. As soon as the petition is filed in the state court, that court can proceed no further. Hence, if the record was filed in the clerk's office, if at rules, no rules can be taken upon it, nor can

[59] Texas & St. L. R. Co. v. Rust (C. C.) 17 Fed. 275. *See "Removal of Causes," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 204, 205.*

[60] (C. C.) 37 Fed. 727. *See "Removal of Causes," Dec. Dig. (Key-No.) §§ 95, 113; Cent. Dig. §§ 204, 205, 240.*

[61] Glover v. Shepperd (C. C.) 15 Fed. 833. *See "Removal of Causes," Dec. Dig. (Key-No.) § 93; Cent. Dig. § 191.*

any default be entered after the filing of such petition. On the other hand, until the filing of the transcript of the record in the federal court, it is impossible to take any rules or enter any orders of default in that court, for the case is not there for the purpose. Hence, as far as maturing the case to issue is concerned, there is, if not an intermediate state, at least a period of suspended animation, during which the case remains in statu quo. As soon as filed in the federal court, then the case revives, and the parties are required by section 29 of the Judicial Code to plead, answer, or demur within thirty days after so filing the record.

A failure to file the record within the required time will not defeat the right of removal, as the delay is not a jurisdictional defect. In fact, if the state court wrongfully refuses to remove the case, and the petitioner saves his exception, and does not file his record in the federal court, but fights the case through even to the Supreme Court of the United States on the question of his right of removal, and wins, he can, after such successful contest, still file his record in the federal court.[82]

Place of Removal When Court Sits in Different Localities

In many districts the court meets at different points, and it then becomes a question where the record should be filed. In the Eastern district of Virginia, for illustration, there is but one district court for the whole district, and there are no laws requiring cases in certain portions of the territory of that district to be brought at certain points. The court meets at three places—Richmond, Norfolk, and Alexandria—but it is one court, and has but one clerk, and its jurisdiction extends over the entire district.

In such cases there is no reason why it may not be filed at any place where the court sits, that being a mere ques-

[82] Baltimore & O. Ry. Co. v. Koontz, 104 U. S. 5, 26 L. Ed. 643; National S. S. Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87. *See "Removal of Causes," Dec. Dig. (Key-No.) § 95; Cent. Dig. § 204.*

tion of convenience. But as to districts containing more than one division, section 53 of the Judicial Code provides that "in all cases of the removal of suits from the courts of a state to the district court of the United States such removal shall be to the United States district court in the division in which the county is situated from which the removal is made; and the time within which the removal shall be perfected, in so far as it refers to or is regulated by the terms of United States courts, shall be deemed to refer to the terms of the United States district court in such division."

When the record is filed too late, the court has a legal discretion whether to remand or not.[63]

It may happen that the defendant, after filing his petition in the state court, will purposely not file it in the federal court. In order to prevent any injustice under these circumstances, it has been held that the plaintiff himself may file the record in the federal court, and then move to remand.[64]

Power of Federal Court after Removal

The twenty-ninth section of the Judicial Code provides that the case thereupon proceeds in the same manner as if it had originally been commenced in the district court. However, the federal court only attains the jurisdiction which the state court had, and hence any point can be made in the federal court that could have been made in the state court.[65] But the plaintiff may dismiss after removal, and sue again in the state court.[66]

[63] Kidder v. Featteau (C. C.) 2 Fed. 616; St. Paul & C. R. Co. v. McLean, 108 U. S. 212, 2 Sup. Ct. 498, 27 L. Ed. 703. *See "Removal of Causes," Dec. Dig. (Key-No.) § 102; Cent. Dig. § 223.*

[64] Anderson v. Appleton (C. C.) 32 Fed. 855. *See "Removal of Causes," Dec. Dig. (Key-No.) § 92; Cent. Dig. § 213.*

[65] East Tennessee, V. & G. R. Co. v. Southern Tel. Co., 112 U. S. 306, 5 Sup. Ct. 168, 28 L. Ed. 746. On the other hand, the federal

[66] See note 66 on following page.

The petitioner after removal may make points questioning the jurisdiction of the case on the ground of improper service of process, or other points for which a special appearance would have to be entered, for the filing of the petition for removal is not a general appearance. The reason of this is that the object of removing a case is to give the federal court jurisdiction to try any questions that can arise in the case, as it is necessary for the protection of the nonresident defendant that the federal court may pass upon all questions involved.

In Goldey v. Morning News [67] the petition for removal stated upon its face that it was intended only as a special appearance, and the court held that when so worded it had only that effect.

But in Wabash Western Ry. Co. v. Brow [68] the petition was in the ordinary form, and did not purport on its face to be a special appearance. The court held in this case, also, that it was, in law, only a special appearance, and was not a waiver of the right to raise any defects even in the service of process.

court after removal can act on questions pending at filing petition, or take up any growing out of attachment proceedings. Mannington v. Hockington Val. R. Co. (C. C.) 183 Fed. 133; Clark v. Wells, 203 U. S. 164, 27 Sup. Ct. 43, 51 L. Ed. 138. *See "Removal of Causes," Dec. Dig. (Key-No.) § 111; Cent. Dig. §§ 237–239.*

[66] Southern R. Co. v. Miller, 217 U. S. 209, 30 Sup. Ct. 450, 54 L. Ed. 732. *See "Removal of Causes," Dec. Dig. (Key-No.) § 109; Cent. Dig. § 235.*

[67] 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517. *See "Removal of Causes," Dec. Dig. (Key-No.) § 112; Cent. Dig. § 238.*

[68] 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431. See, also, Clark v. Wells, 203 U. S. 164, 27 Sup. Ct. 43, 51 L. Ed. 138; Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 30 Sup. Ct. 125, 54 L. Ed. 272; Murphy v. Herring-Hall-Marvin Safe Co. (C. C.) 184 Fed. 495. *See "Removal of Causes," Dec. Dig. (Key-No.) § 112; Cent. Dig. § 238.*

MOTION TO REMAND

132. The proper way for the party who opposes the removal to question the jurisdiction of the court is by a motion made in the federal court to remand the case to the state court. On this motion in the federal court he can try both questions of law and fact, but the allegations of the petition are prima facie to be taken as true.[69] The decision of the district court remanding the case is not appealable.

The act provides that, if the federal court remands the case, there can be no appeal from this decision; and this means not only that there can be no direct process to review the decision by appeal or writ of error, but that it cannot be questioned by any other process, like mandamus. The decision of the district court on the subject is final.[70]

Nor can the remanding of the case by the court be questioned by writ of error to the state court after the state court has resumed jurisdiction.

In Missouri Pac. Ry. Co. v. Fitzgerald,[71] the state court had first entered an order removing the case, and then the circuit court had remanded it. The case thereupon pro-

[69] Loop v. Winter's Estate (C. C.) 115 Fed. 362; Camp v. Field (C. C.) 189 Fed. 285. On such a motion the federal court may examine the question of good faith when it is alleged that parties are joined to defeat jurisdiction. Clark v. Chicago, R. I. & P. R. Co. (D. C.) 194 Fed. 505. *See "Removal of Causes," Dec. Dig. (Key-No.) § 107; Cent. Dig. §§ 225–234.*

[70] Ex parte Pennsylvania Co., 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738; Powers v. Chesapeake & O. R. Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. *See "Removal of Causes," Dec. Dig. (Key-No.) § 107; Cent. Dig. §§ 225–234; "Appeal and Error," Cent. Dig. §§ 724, 725.*

[71] 160 U. S. 556, 16 Sup. Ct. 389, 40 L. Ed. 536. *See "Removal of Causes," Dec. Dig. (Key-No.) § 107; Cent. Dig. §§ 225–234; "Appeal and Error," Cent. Dig. §§ 724, 725.*

ceeded in the state court, and the party who had originally petitioned for its removal took out a writ of error to the state court from the Supreme Court on the ground that he was denied a federal right. The Supreme Court held that his denial of this right was not by the state court, but by the circuit court, and that its acts could not be reviewed in this indirect way.

The refusal of the court to remand a case can be made the subject of exception, and can be taken up after a final decree in the case. It is, however, not a final decree.[72]

After a case is remanded to the state court, its jurisdiction revests, and the case proceeds there just as it would have done in the first instance.[73]

Mandamus will lie to compel remand of case over which the federal court has no jurisdiction.[74]

[72] Edrington v. Jefferson, 111 U. S. 770, 4 Sup. Ct. 683, 28 L. Ed. 594; Bender v. Pennsylvania Co., 148 U. S. 502, 13 Sup. Ct. 640, 37 L. Ed. 537. *See "Removal of Causes," Dec. Dig. (Key-No.) § 107; Cent. Dig. §§ 225–234.*

[73] Birdseye v. Shaeffer (C. C.) 37 Fed. 821; Des Moines & Mississippi Levee Dist. No. 1 v. Chicago, B. & Q. R. Co., 240 Mo. 614, 145 S. W. 35, 39 L. R. A. (N. S.) 543; Queen Ins. Co. v. Peters, 10 Ga. App. 289, 73 S. E. 536. *See "Removal of Causes," Dec. Dig. (Key-No.) § 109; Cent. Dig. § 235.*

[74] In re Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264. *See "Removal of Causes," Dec. Dig. (Key-No.) § 109; Cent. Dig. § 235.*

CHAPTER XVII

OTHER COURTS VESTED WITH ORIGINAL JURISDICTION

133. The Supreme Court.
134. Other Courts of Less General Interest.

THE SUPREME COURT AS A COURT OF ORIGINAL JURISDICTION

133. The Supreme Court of the United States exercises original jurisdiction in cases affecting ambassadors, public ministers, and consuls, and civil cases involving controversies where a state is a party, comprehending controversies:

(a) Between states—Jurisdiction exclusive.
(b) Between the United States and a state.
(c) Between a state and citizens of another or other states.
(d) Between a state and an alien or aliens.

The third article of the Constitution requires that there shall be one Supreme Court, and this is the only court established by the Constitution itself. The second section of the same article defines the federal judicial power, and, among others, names cases affecting ambassadors, other public ministers, and consuls, controversies between two or more states, and controversies between a state and citizens of another state.

The same section further provides that in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. This provision giving original jurisdiction to the Supreme Court direct, does

not, however, prevent Congress from conferring concurrent jurisdiction in those cases on other federal courts.[1]

Acting under this grant, Congress, by section 233 of the Judicial Code, has provided as follows:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul is a party."

Controversies Where a State is a Party

The statute limits these cases to controversies of a civil nature. This was in pursuance of the decisions rendered under the constitutional grant, which had held that the intent of the Constitution was simply to confer upon the federal courts jurisdiction of that sort. It could not have been the intent of the framers of the Constitution to give the federal court original jurisdiction of criminal proceedings in a state court.[2]

Proceedings for penalties, or a suit by a state on a judgment recovered under a statute creating a penalty, are not within the grant.[3]

[1] Bors v. Preston, 111 U. S. 252, 4 Sup. Ct. 407, 28 L. Ed. 419; Ames v. Kansas, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482. *See "Courts," Dec. Dig. (Key-No.) § 518; Cent. Dig. §§ 1109, 1444–1449.*

[2] Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257. *See "Courts," Dec. Dig. (Key-No.) § 379; Cent. Dig. § 986.*

[3] WISCONSIN v. PELICAN INS. CO., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239. *See "Courts," Dec. Dig. (Key-No.) § 379; Cent. Dig. § 986.*

Nor was it the intent to give jurisdiction, merely because a state happens to be named as a party, over such cases as were not properly cognizable by courts of justice—as, for instance, mere political questions.[4]

Controversies where a state is a party may be considered under the several following heads:

1. Controversies between states.
2. Controversies between the United States and states.
3. Controversies between a state and its own citizens.
4. Controversies between a state and citizens of other states.
5. Controversies between states and aliens.

Controversies between States

In this case the jurisdiction of the Supreme Court is exclusive, it being thought that it was the only tribunal of sufficient dignity to justify bringing sovereign states before it. The states alluded to are states of the Union.[5]

And it means states as a unit, not mere political subdivisions of states, like counties.[6]

Same—Boundary Disputes

This is in the most common instance in which jurisdiction has been exercised by the Supreme Court, and the cases under this subject are quite numerous. In such case the Supreme Court uses the forms of equity proceedings, and frames its own pleadings and process in each case. An interesting case on the subject is Rhode Island v. Massachusetts.[7]

[4] State of Georgia v. Stanton, 6 Wall. 50, 18 L. Ed. 721. *See "Courts," Dec. Dig. (Key-No.) § 379; Cent. Dig. §§ 985–989.*

[5] Texas v. White, 7 Wall. 700, 19 L. Ed. 227. *See "Courts," Dec. Dig. (Key-No.) § 304; Cent. Dig. §§ 986, 987.*

[6] Lincoln Co. v. Luning, 133 U. S. 529, 10 Sup. Ct. 363, 33 L. Ed. 766. *See "Courts," Dec. Dig. (Key-No.) § 304; Cent. Dig. §§ 986, 987.*

[7] 12 Pet. 657, 9 L. Ed. 1233; 13 Pet. 23, 10 L. Ed. 41; 14 Pet. 210, 10 L. Ed. 423; 15 Pet. 233, 10 L. Ed. 721. See, also, Louisiana v. Mississippi, 202 U. S. 1, 26 Sup. Ct. 408, 571, 50 L. Ed. 913. *See "Courts," Dec. Dig. (Key-No.) § 304; Cent. Dig. § 987.*

Same—Other Instances

There are many other disputes between states, however, which come within this act. For instance, a suit by Missouri against Illinois to prevent a political subdivision of the latter state from emptying into the Mississippi river, by a drainage canal, the sewerage of the city of Chicago, was held within the jurisdiction of the court.[8]

This provision, however, cannot be used in such a manner as to allow a state having no interest itself to permit the use of its name to its citizens for the purpose of collecting debts—as, for instance, suits by a state for the benefit of its citizens against another state on the bonds of the latter.[9]

But where the state is the actual owner of the bonds, and those bonds are secured by stock pledged by way of mortgage or collateral, the Supreme Court has jurisdiction of a suit by such state, as owner, at least to the extent of foreclosing its mortgage, although the bonds were merely given to the state, and although the motive of the donors was to enable the state to test their validity by such suit.[10]

The jurisdiction extends to a suit by Virginia against West Virginia to compel the latter to assume its just proportion of the debt due by the state before the division.[11]

On the other hand, a suit by a state against another state to prevent the use by the latter state of its quarantine laws

[8] MISSOURI v. ILLINOIS, 180 U. S. 208, 21 Sup. Ct. 331, 45 L. Ed. 497. So a suit by one state to prevent the appropriation by another state of the waters of a river flowing through both. Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956. *See "Courts," Dec. Dig. (Key-No.) § 304; Cent. Dig. §§ 986, 987.*

[9] New Hampshire v. Louisiana, 108 U. S. 76, 2 Sup. Ct. 176, 27 L. Ed. 656. *See "Courts," Dec. Dig. (Key-No.) § 304; Cent. Dig. § 986.*

[10] SOUTH DAKOTA v. NORTH CAROLINA, 192 U. S. 286, 24 Sup. Ct. 269, 48 L. Ed. 448. *See "Courts," Dec. Dig. (Key-No.) § 304; Cent. Dig. § 986.*

[11] Virginia v. West Virginia, 206 U. S. 290, 27 Sup. Ct. 732, 51 L. Ed. 1068; Id., 220 U. S. 1, 31 Sup. Ct. 330, 55 L. Ed. 353. *See "Courts," Dec. Dig. (Key-No.) § 304; Cent. Dig. § 986.*

in such a way as to affect the commerce of citizens of the plaintiff state cannot be sustained, since the state, as a state, would have no interest in such a suit, but it would really be for the benefit of its citizens alone.[12]

Controversies Between the United States and a State

The Supreme Court has jurisdiction of such controversies, where the United States are plaintiffs, but not where they are defendants.[13]

Controversies Between a State and Its Own Citizens

Notwithstanding the broad language of the section defining the jurisdiction, there is no cognizance of such cases, whether the state is plaintiff or defendant.[14]

And under the influence of the principle so often applied in the federal courts that the jurisdiction must exist as to all the parties on both sides, the joinder of a citizen of a state with citizens of other states will defeat jurisdiction of a suit brought by a state.[15]

Controversies Between a State and Citizens of Another State

Soon after the adoption of the Constitution, the Supreme Court decided in Chisholm v. Georgia,[16] that this constitutional grant enabled a citizen of another state to sue a state in the Supreme Court. The uproar created by this decision is well known in our political history, and resulted in the adoption of the eleventh amendment, which express-

[12] Louisiana v. Texas, 176 U. S. 1, 20 Sup. Ct. 251, 44 L. Ed. 347. *See "Courts," Dec. Dig. (Key-No.) § 304; Cent. Dig. § 986.*

[13] U. S. v. Texas, 143 U. S. 621, 12 Sup. Ct. 488, 36 L. Ed. 285; Kansas v. U. S., 204 U. S. 331, 27 Sup. Ct. 388, 51 L. Ed. 510. *See "Courts," Dec. Dig. (Key-No.) § 302; Cent. Dig. §§ 843, 986.*

[14] Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842; Pennsylvania v. Quicksilver Min. Co., 10 Wall. 553, 19 L. Ed. 998. *See "Courts," Dec. Dig. (Key-No.) § 303; Cent. Dig. § 844.*

[15] California v. Southern Pac. Co., 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683. *See "Courts," Dec. Dig. (Key-No.) §§ 303, 304; Cent. Dig. §§ 844, 844½; "States," Cent. Dig. §§ 191, 192.*

[16] 2 Dall. 419, 1 L. Ed. 440. *See "Courts," Dec. Dig. (Key-No.) § 303; Cent. Dig. §§ 844, 844½; "States," Cent. Dig. §§ 191, 192.*

ly forbade such suits, so that a state cannot now be made a defendant at the suit of a citizen of another state.[17]

Controversies Between a State and Aliens

The same principle would prevent an alien from suing a state as defendant, and it is perfectly clear that a suit between aliens and a private citizen would not come under this classification.[18]

Proceedings Against Ambassadors

These suits only lie in cases where such parties can be sued under the general principles of international law; and the provision does not apply to a citizen of the United States, though he may be a consul general of a foreign power, when he is merely acting temporarily in the absence of the regular diplomatic representative.[19]

VARIOUS OTHER COURTS OF ORIGINAL JURISDICTION

134. Besides the courts heretofore discussed, there are other important federal courts vested with original jurisdiction but not of general interest to the practitioner, and hence beyond the purview of this treatise. Such are the court of claims, the court of customs appeals, the commerce court, the courts of original jurisdiction in the District of Columbia, and the courts of the territories or dependencies.

[17] Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. Ed. 805. *See "Courts," Dec. Dig. (Key-No.) § 303; Cent. Dig. §§ 844, 844½; "States," Cent. Dig. §§ 191, 192.*

[18] In re Barry, 2 How. 65, 11 L. Ed. 181. *See "Courts," Dec. Dig. (Key-No.) § 303; Cent. Dig. §§ 844, 844½, 990.*

[19] In re Baiz, 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222. *See "Courts," Dec. Dig. (Key-No.) § 301; Cent. Dig. § 842.*

The Court of Claims

This was for a long time the only court in which the United States could be sued. Its jurisdiction covers that conferred on the district court and a good deal more. Its organization and jurisdiction are set out in sections 136–187 of the Judicial Code.

The Court of Customs Appeals

The organization and jurisdiction of this court are set out in sections 188–199 of the Judicial Code.

The Commerce Court

This court started out under bright auspices, but some of its decisions were unsatisfactory, so that the necessary appropriations to keep it up have been withheld. Its organization and jurisdiction are embodied in sections 200–214 of the Judicial Code. It was composed of circuit judges, five new ones having been provided by the act establishing the court; and these with the former circuit judges were designed to sit on this court and on the circuit courts of appeals in rotation.[20]

Courts of the Territories or Dependencies

Their organization and jurisdiction are set out in the special statutes relating to Alaska, Hawaii, Porto Rico and the Philippines, and are of no general interest.

[20] The following are some of the decisions rendered by this court during its brief life, and their fate in the Supreme Court: Proctor & Gamble Co. v. U. S., 188 Fed. 221, reversed 225 U. S. 282, 32 Sup. Ct. 761, 56 L. Ed. 1091; Hooker v. Interstate Commerce Commission, 188 Fed. 242, reversed 225 U. S. 302, 32 Sup. Ct. 769, 56 L. Ed. 1099; Interstate Commerce Commission v. Baltimore & O. R. Co., 225 U. S. 326, 32 Sup. Ct. 742, 56 L. Ed. 1107; U. S. v. Baltimore & O. R. Co., 225 U. S. 306, 32 Sup. Ct. 817, 56 L. Ed. 1100. After the main text was written and on the eve of the appearance of this work the deficiency appropriation act of October 22, 1913, abolished this court and transferred its jurisdiction to the district courts. See Appendix, post, p. 701. *See "Commerce," Dec. Dig. (Key-No.) § 92.*

CHAPTER XVIII

PROCEDURE IN THE ORDINARY FEDERAL COURTS OF ORIGINAL JURISDICTION—COURTS OF LAW

135. Distinction between Law and Equity.
136. Procedure in Courts of Law.
137. Same—Process.
138. Same—Attachments.
139. Same—Appearances.
140. Same—Parties to Common-Law Actions.
141. Same—Pleading.
142. Same—Continuances.
143. Same—Trial.
144. Same—Same—Evidence.
145. Same—Same—Instructions to Jury.
146. Same—Same—Bill of Exceptions.
147. Same—Same—Verdict.
148. Same—Motion for New Trial.
149. Same—Motion in Arrest of Judgment.
150. Same—Judgment.
151. Same—Execution.

DISTINCTION BETWEEN LAW AND EQUITY

135. **The distinction between law and equity in the federal courts in all matters of procedure is carefully preserved and guarded, for it is a distinction made by the Constitution. Hence the federal courts preserve this distinction, and are not affected by the reform procedure adopted in many of the state courts abolishing it.**

Equitable Titles

For this reason equitable titles or suits of an equitable nature cannot be sustained on the common-law side of the federal court, nor can a state statute prescribing a remedy at law for a cause of action essentially equitable in its nature apply to the federal courts.[1]

[1] Fenn v. Holme, 21 How. 481, 16 L. Ed. 198; Lindsay v. First Nat. Bank, 156 U. S. 485, 15 Sup. Ct. 472, 39 L. Ed. 505; McKemy

On the same principle, although the federal courts will follow the state courts in their rules as to the joinder of causes of action, provided the causes of action are all legal in their nature, they will not allow the joinder of legal and equitable causes of action in one suit.[2]

Equitable Defenses

So, too, equitable defenses cannot be set up in the federal courts in actions at law. For instance, they cannot take cognizance of a plea of equitable set-off;[3] nor of an equitable title in defense to an action of ejectment.[4] But many defenses equitable in nature may be proved by way of counterclaim under a plea of the general issue or payment, if growing out of the same transaction; that being allowable under the later common-law decisions.[5]

Nor can a reply to a plea be made which sets up an equitable ground as a means of defeating the defense made by the plea; as, for instance, where the defendant pleaded a release, the plaintiff cannot reply that the release was obtained by fraud and misrepresentation, though the state practice allowed it.[6]

v. Supreme Lodge A. O. U. W., 180 Fed. 961, 104 C. C. A. 117. *See "Courts," Dec. Dig. (Key-No.) § 342; Cent. Dig. §§ 912, 913.*

[2] SCOTT v. NEELY, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Bennett v. Butterworth, 11 How. 669, 13 L. Ed. 859; American Creosote Works v. C. Lembcke & Co. (C. C.) 165 Fed. 809. *See "Courts," Dec. Dig. (Key-No.) § 342; Cent. Dig. §§ 912, 913.*

[3] Scott v. Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059; Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679. *See "Courts," Dec. Dig. (Key-No.) § 342; Cent. Dig. §§ 912, 913.*

[4] Schoolfield v. Rhodes, 82 Fed. 153, 27 C. C. A. 95. *See "Courts," Dec. Dig. (Key-No.) § 342; Cent. Dig. §§ 912, 913.*

[5] DUSHANE v. BENEDICT, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. Ed. 810. *See "Courts," Dec. Dig. (Key-No.) § 342; Cent. Dig. §§ 912, 913.*

[6] Hill v. Northern Pac. R. Co., 113 Fed. 914, 51 C. C. A. 544. *See "Courts," Dec. Dig. (Key-No.) §§ 335, 342; Cent. Dig. §§ 902–907½, 912, 913.*

PROCEDURE IN COURTS OF LAW

136. The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty cases in district courts of the United States, conform as nearly as practicable to those existing in like causes in the courts of record of the state within which district courts are held, except that the federal courts are given power within prescribed limits to make rules for the regulation of the details of their own practice, provided, however, the substance and general methods of procedure in the state courts are observed.

The subject of procedure is regulated by chapter 18 of title 13 of the Revised Statutes.[7] In so far as this applies to the common-law courts, the most important provision is section 5 of the act of June 1, 1872, embodied in section 914 of the Revised Statutes,[8] which reads as follows:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

This act must also be construed in connection with section 918 of the Revised Statutes,[9] which reads:

"The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules

[7] U. S. Comp. St. 1901, p. 680.
[8] U. S. Comp. St. 1901, p. 684.
[9] U. S. Comp. St. 1901, p. 685.

and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

Under these two sections, the federal courts are not bound to adopt the state practice in all its details, but they have a discretion in conforming only "as near as may be," and in regulating by rule details which would not change the substance and general methods of procedure of the state practice.[10]

SAME—PROCESS

137. The federal courts adopt the general forms of process of the state courts on the common-law side, subject, however, to their own regulations. But the federal law requires that their process shall be under the seal of the court, and signed by the clerk, and that those issuing from the Supreme Court shall bear teste of the chief justice or associate justice next in precedence when the chief justiceship is vacant; and those issuing from the district court shall bear teste of the district judge; or, when that office is vacant, of the clerk.

Defective process may be amended, but no amendment can make a void process valid.

The federal courts adopt the general forms of process of the state courts on the common-law side, subject, however, to their own regulations. Sections 911 and 912, however,

[10] SHEPARD v. ADAMS, 168 U. S. 618, 18 Sup. Ct. 214, 42 L. Ed. 602; Hills & Co. v. Hoover, 220 U. S. 329, 31 Sup. Ct. 402, 55 L. Ed. 485, Ann. Cas. 1912C, 562; Walker v. Monad Engineering Co., 196 Fed. 206, 116 C. C. A. 38. *See "Courts," Dec. Dig. (Key-No.) § 341; Cent. Dig. § 899.*

are obligatory on process of the federal courts. They require that the process shall be under the seal of the court, and signed by the clerk, and that those issuing from the Supreme Court or circuit court shall bear teste of the chief justice or associate justice next in precedence when the chief justiceship is vacant; and those issuing from the district court shall bear teste of the district judge, or, when that office is vacant, of the clerk. Hence, under this provision, no process can be used in the federal courts which does not issue from the court, and is not in conformity with the provisions of these sections. This excludes the procedure by motion common in some states, when the notice of motion is simply signed by the attorneys and served on the attorneys. A motion, when authorized by state practice, can be used in the federal courts; but in such case the notice of the motion which is served on the defendant must be signed by the clerk, and must be under the seal of the court. In that form the procedure is correct, and not at all uncommon.[11]

Except as to the method of signature, however, the form of the process in the state courts on the common-law side can be used in the federal courts.[12]

Amendments

Process issuing from the federal courts may be amended under the provisions of section 948 of the Revised Statutes,[13] which enacts:

[11] Dwight v. Merritt (C. C.) 4 Fed. 614; Peaslee v. Haberstro, Fed. Cas. No. 10,884. But see, contra, Leas & McVitty v. Merriman (C. C.) 132 Fed. 510; Schofield v. Palmer (C. C.) 134 Fed. 753. *See "Courts," Dec. Dig. (Key-No.) § 344; Cent. Dig. § 917.*

[12] Gillum v. Stewart (C. C.) 112 Fed. 30. But the federal courts may make their own regulations as to return days. Boston & M. R. Co. v. Gokey, 210 U. S. 155, 28 Sup. Ct. 657, 52 L. Ed. 1002; U. S. v. United States Fidelity & Guaranty Co., 186 Fed. 477, 108 C. C. A. 455. *See "Courts," Dec. Dig. (Key-No.) § 344; Cent. Dig. § 917.*

[13] U. S. Comp. St. 1901, p. 695; Speare v. Stone, 193 Fed. 375, 113 C. C. A. 301. *See "Courts," Dec. Dig. (Key-No.) § 344; Cent. Dig. §*

"Any circuit or district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure the party against whom such process issues."

This only allows, however, an amendment of a defective process. If the defect is so serious as to make it absolutely void, and no process at all, then it cannot be amended; as where it is neither signed nor sealed.[14]

Service

The service of process is as provided by the state statute.[15] But in the case of foreign corporations this is subject to the proviso that the corporation must be doing business within the jurisdiction, before process can be served on it. If it is not carrying on business there, service cannot be made upon one of its officers merely because he resides there.[16]

SAME—ATTACHMENTS

138. The state attachment laws in force on June 1, 1872, and any later ones adopted by rule of court, are available in the federal courts in common-law causes, except as against a nonresident not personally served in the district.

917; "Process," Dec. Dig. (Key-No.) §§ 162–164; Cent. Dig. §§ 224–248.

[14] Dwight v. Merritt (C. C.) 4 Fed. 614. *See "Process," Dec. Dig. (Key-No.) § 163; Cent. Dig. §§ 224–238.*

[15] Amy v. City of Watertown, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. Ed. 946. *See "Courts," Dec. Dig. (Key-No.) § 344; Cent. Dig. § 917.*

[16] BARROW S. S. CO. v. KANE, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; St. Louis Southwestern R. Co. v. Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. ——; Higham v. Iowa State Travelers' Ass'n (C. C.) 193 Fed. 845. *See "Courts," Dec. Dig. (Key-No.) § 344; Cent. Dig. § 917.*

Section 915 of the Revised Statutes [17] provides as follows:

"In common-law causes in the circuit and district courts the plaintiffs shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process: Provided, that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy."

But, as seen in a previous connection, the federal courts cannot issue an attachment against a nonresident when he is not found in the district, or when there is no other ground of jurisdiction.[18]

It is clear from the language of the above section that this adopted simply the attachment laws which were in force on June 1, 1872, and that subsequent attachment laws of the states are not adopted unless the court specially provides therefor by general rule; but under this statute and section 914, the general state practice in relation to attachments is adopted.[19]

[17] U. S. Comp. St. 1901, p. 684.

[18] In re DES MOINES & M. RY. CO., 103 U. S. 794, 26 L. Ed. 461; Big Vein Coal Co. v. Read, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. —; U. S. v. Brooke (D. C.) 184 Fed. 341; ante, p. 275. *See "Courts," Dec. Dig. (Key-No.) § 270; Cent. Dig. § 810.*

[19] Logan v. Goodwin, 104 Fed. 490, 43 C. C. A. 658; Commonwealth Trust Co. v. Frick (C. C.) 120 Fed. 688. *See "Courts," Dec. Dig. (Key-No.) § 346; Cent. Dig. § 918.*

SAME—APPEARANCES

139. As to the effect of the defendant's appearance, the federal courts are not bound to follow state statutes prescribing a certain result as flowing from the entry of an appearance; as, for instance, state statutes which provide that a special appearance shall have the effect of a general appearance.

As the practice only conforms "as near as may be," the federal courts have a discretion to disregard this provision of the state court.[20]

SAME—PARTIES TO COMMON-LAW ACTIONS

140. The rules as to parties to actions are substantially similar to those prevailing in the state courts of the locality, subject to certain exceptions incident to the nature of the federal courts and the character of their jurisdiction.

State statutes allowing parties in real interest to sue in their own names are adopted by the federal courts, subject, always, to the proviso that, if the real interest which they attempt to assert is an equitable interest, they cannot sue in the federal courts in their own names; for, as seen above, equitable titles cannot be asserted in the federal courts on the law side.[21]

[20] Mexican Cent. R. Co. v. Pinkney, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699. *See "Courts," Dec. Dig. (Key-No.) §§ 341, 345; Cent. Dig. §§ 899, 917.*

[21] New York Continental Jewall Filtration Co. v. Sullivan (C. C.) 111 Fed. 179; Mead v. Chesbrough Bldg. Co., 151 Fed. 998, 81 C. C. A. 184; Beatty v. Wilson (C. C.) 161 Fed. 453. *See "Courts," Dec. Dig. (Key-No.) § 343; Cent. Dig. §§ 915–920.*

But an assignee can sue in his own name where the state statute allows it and vests him with the legal title.[22]

Where a state statute allows a wife to sue in her own name for damages to person or character, the federal statute allows her also.[23]

Where there is an improper joinder of parties, and the state statute allows the improper parties to be stricken out, the same practice will be followed by the federal courts.[24]

SAME—PLEADING

141. The pleading in the federal courts is substantially similar to that in the state courts of the locality.

Amendments are liberally allowed in case of formal defects in a way to enable the courts to administer justice and render decisions according to the very right of the cause.

The forms of action in the state courts on the common-law side are adopted by the federal courts. In fact this was the prime object of the passage of the act of June 1, 1872, so as to save the bar the necessity of having to learn and practice two entirely different systems of pleading.[25]

Hence the state rule as to the effect of a general issue,

[22] Albany & R. Iron & Steel Co. v. Lundberg, 121 U. S. 451, 7 Sup. Ct. 958, 30 L. Ed. 982; Nederland Life Ins. Co. v. Hall, 84 Fed. 278, 27 C. C. A. 390. *See "Courts," Dec. Dig. (Key-No.) § 343; Cent. Dig. §§ 915–920.*

[23] Morning Journal Ass'n v. Smith, 56 Fed. 141, 4 C. C. A. 8. *See "Courts," Dec. Dig. (Key-No.) § 343; Cent. Dig. §§ 915–920.*

[24] Perry v. Mechanics' Mut. Insurance Co. (C. C.) 11 Fed. 478; Whitaker v. Pope, Fed. Cas. No. 17,528. *See "Courts," Dec. Dig. (Key-No.) § 343; Cent. Dig. §§ 915–920.*

[25] INDIANAPOLIS & ST. L. R. CO. v. HORST, 93 U. S. 291, 23 L. Ed. 898; Knight v. Illinois Cent. R. Co., 180 Fed. 368, 103 C. C. A. 514. *See "Courts," Dec. Dig. (Key-No.) § 342; Cent. Dig. §§ 912, 913.*

and what is provable under it, is adopted by the federal courts.[26]

Amendments

The federal courts are liberal in the allowance of amendments. Section 954 of the Revised Statutes [27] provides:

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

It not only acts under this section in liberally allowing amendments, but it also adopts the practice of the state courts in the allowance of amendments in so far as that practice does not conflict with the rights given by the above section. For instance, where the state practice allows it, a new count can be added to the declaration.[28]

So, too, where a foreign administrator sues in the federal courts without having had a local qualification, he can qual-

[26] Roberts v. Lewis, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579; DUSHANE v. BENEDICT, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. Ed. 810. If a general denial in the state practice puts in issue every material fact, it would put in issue the question of jurisdiction in the federal court. Lindsay-Bitton Live Stock Co. v. Justice, 191 Fed. 163, 111 C. C. A. 525. *See "Courts," Dec. Dig. (Key-No.) § 347; Cent. Dig. § 921.*

[27] U. S. Comp. St. 1901, p. 696.

[28] WEST v. SMITH, 101 U. S. 263, 25 L. Ed. 809. *See "Courts," Dec. Dig. (Key-No.) § 347; Cent. Dig. § 921.*

ify after the institution of the suit, and then amend, setting up his local qualification.[29]

A widow who sues as administrator can amend by bringing the suit in her own right, and vice versa.[30]

An amendment of the declaration may be made during the trial in order to avoid a variance.[31]

Under section 954 an amendment can be made in the federal courts even after judgment, and in as vital a matter as the allegation of citizenship.[32]

In fact, whatever the state practice may be as to amendments, it cannot restrict the right of the federal courts under section 954, but that section governs in case of conflict or difference of practice.[33]

SAME—CONTINUANCES

142. In the matter of continuances the federal courts follow their own rules, and are not affected by the state law or practice, as continuances are not considered to come within the purview of section 914.[34]

[29] Hodges v. Kimball, 91 Fed. 845, 34 C. C. A. 103; Dodge v. North Hudson (C. C.) 188 Fed. 491. *See "Courts," Dec. Dig. (Key-No.) § 347; Cent. Dig. § 921.*

[30] Van Doren v. Railroad Co., 93 Fed. 260, 35 C. C. A. 282; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. —. *See "Courts," Dec. Dig. (Key-No.) § 347; Cent. Dig. § 921.*

[31] Bamberger v. Terry, 103 U. S. 40, 26 L. Ed. 317; Snare & Triest Co. v. Friedman, 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367. *See "Courts," Dec. Dig. (Key-No.) § 347; Cent. Dig. § 921.*

[32] Mexican Cent. Ry. Co. v. Duthie, 189 U. S. 76, 23 Sup. Ct. 610, 47 L. Ed. 715. *See "Courts," Dec. Dig. (Key-No.) § 347; Cent. Dig. § 921.*

[33] Lange v. Union Pac. R. Co., 126 Fed. 338, 62 C. C. A. 48; Reardon v. Balaklala Consol. Copper Co. (C. C.) 193 Fed. 189. *See "Courts," Dec. Dig. (Key-No.) § 259; Cent. Dig. §§ 795, 796.*

[34] Texas & P. R. Co. v. Nelson, 50 Fed. 814, 1 C. C. A. 688. *See "Courts," Dec. Dig. (Key-No.) § 352; Cent. Dig. § 932.*

The granting or refusing of a continuance in a federal court is a matter of discretion with the judge.[35]

SAME—TRIAL

143. The making up of the jury in the federal courts is largely under the court's control, and it may adopt the state practice or not, as it thinks fit, so far as it does not conflict with the federal statutes.[36]

The federal courts have their own procedure in reference to the question of trying cases without a jury. The trial may be without a jury when the jury is waived in writing.

Section 649 of the Revised Statutes[37] provides:

"Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

And section 700 of the Revised Statutes[38] provides:

"When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Su-

[35] Fidelity & Deposit Co. v. L. Bucki & Son Lumber Co., 189 U. S. 135, 23 Sup. Ct. 582, 47 L. Ed. 744. *See "Courts," Dec. Dig. (Key-No.) § 352; Cent. Dig. § 932.*

[36] Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; Judicial Code, § 275–288. *See "Courts," Dec. Dig. (Key-No.) § 352; Cent. Dig. § 929.*

[37] U. S. Comp. St. 1901, p. 525.

[38] U. S. Comp. St. 1901, p. 570.

preme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

As these statutes referred in terms to the circuit court only, it was held in cases arising before the Judicial Code that there was no authority for waiving a jury in the district court, so that there was no review of matters of fact in that court.[39]

But section 291 of the Judicial Code provides that "wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts."

The provisions of these statutes must be rigidly followed. It is not sufficient for the record simply to state that a jury was waived, but it must appear either by recitals in the record or by the filing of the paper that there was filed a stipulation in writing waiving a jury. Before the act was passed which is now embodied in section 649, the court had decided that, where the parties submitted the whole case to the judge, he acted not as judge, but practically as arbitrator, and there could be no review of his decision.[40]

On similar reasoning, if the waiver is not in accordance with the statute, the same principle would apply, and parties who are not particular about this may find, when they try to reach the appellate court, that they have unconsciously submitted their case to arbitration, and that the court of appeals will not review the decision of the judge sitting without a jury, except as to questions of law not involved

[39] Campbell v. U. S., 224 U. S. 99, 32 Sup. Ct. 398, 56 L. Ed. 684. *See "Courts," Dec. Dig. (Key-No.) § 352; Cent. Dig. § 930.*

[40] Campbell v. Boyreau, 21 How. 223, 16 L. Ed. 96. *See "Courts," Dec. Dig. (Key-No.) § 352; Cent. Dig. §§ 929, 930.*

in the finding of facts, unless the record clearly shows that there was a stipulation in writing waiving a jury.[41]

And even where there is such a stipulation the appellate court can only consider such errors as are excepted to at the time.[42]

In respect to this the federal courts are not affected by state statutes. As the trial must be by jury unless waived, a state statute allowing a reference of a common-law case to auditors or referees will not be followed by the federal courts.[43]

SAME—SAME—EVIDENCE

144. The evidence in the federal courts is taken in a manner similar to that prevailing in the state courts, except that the federal courts have certain rules of their own relating to the taking of depositions.

In common-law cases it is provided by section 861 of the Revised Statutes[44] that the mode of proof in the trial of an action at common law shall be by oral testimony and examination of witnesses in open court except as hereinafter provided. The cases "hereinafter provided" are those sections providing for the taking of depositions de bene esse, or the issuing of commissions.

An important statute in reference to the taking of depositions is the act of March 9, 1892.[45] It provides:

[41] BOND v. DUSTIN, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835; Campbell v. U. S., 224 U. S. 99, 32 Sup. Ct. 398, 56 L. Ed. 684. *See "Courts," Dec. Dig. (Key-No.) § 352; Cent. Dig. §§ 929, 930.*

[42] McCREA v. PARSONS, 112 Fed. 917, 50 C. C. A. 612; Wilson v. Merchants' Loan & Trust Co., 183 U. S. 121, 22 Sup. Ct. 55, 46 L. Ed. 113. *See "Appeal and Error," Dec. Dig. (Key-No.) § 850.*

[43] Sulzer v. Watson (C. C.) 39 Fed. 414; Erkel v. U. S., 169 Fed. 623, 95 C. C. A. 151. *See "Courts," Dec. Dig. (Key-No.) § 352; Cent. Dig. §§ 929, 930.*

[44] U. S. Comp. St. 1901, p. 661.

[45] U. S. Comp. St. 1901, p. 664.

"That in addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the district and circuit courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held."

There is some conflict of decision as to the scope of this act. In the New York circuit it has been held that this act authorizes the adoption of state statutes allowing the examination of the parties to the cause before the actual trial.[46]

On the other hand, the preponderance of authority, and the better authority, is that this statute was simply intended to cover the method of taking the deposition, and not to give any right to compel taking depositions under a state statute, which did not exist before, so that state statutes permitting the examination of parties before the trial are not applicable to the federal courts. These decisions certainly seem to accord best with the language of the act.[47] And the recent decision of the Supreme Court in Hanks Dental Ass'n v. International Tooth Crown Co.[48] settles this as the law.

Where, however, a state statute authorizes a surgical examination, the federal courts will act under it; but the right to do this is based upon section 721 (U. S. Comp. St. 1901, p. 581), adopting the laws of the states as rules of

[46] International Tooth-Crown Co. v. Hanks' Dental Ass'n (C. C.) 101 Fed. 306, overruled Hanks Dental Ass'n v. International Tooth-Crown Co., 194 U. S. 303, 24 Sup. Ct. 700, 48 L. Ed. 989. Compare Cheatham Electric Switching Devise Co. v. Transit Development Co. (C. C.) 190 Fed. 202; Wilson v. New England Nav. Co. (D. C.) 197 Fed. 88. *See "Courts," Dec. Dig. (Key-No.) §§ 351, 371; Cent. Dig. § 924.*

[47] Despeaux v. Pennsylvania R. Co. (C. C.) 81 Fed. 897; National Cash Register Co. v. Leland (C. C.) 77 Fed. 242. *See "Courts," Dec. Dig. (Key-No.) §§ 350, 351; Cent. Dig. §§ 923, 924.*

[48] 194 U. S. 303, 24 Sup. Ct. 700, 48 L. Ed. 989; ante, p. 10. *See "Courts," Dec. Dig. (Key-No.) §§ 350, 351; Cent. Dig. §§ 923, 924.*

decision in trials at common law, and is not based upon the theory that such a statute is a statute relating to evidence.[49]

SAME—SAME—INSTRUCTIONS TO JURY

145. In instructing a jury the federal courts are not bound by the state practice, but follow their own rules, regardless of state legislation to the contrary.

A federal judge has full power to charge a jury.

A federal judge may direct a verdict where the facts are undisputed, or the preponderance of evidence is so strong that reasonable men should not differ as to the deductions to be drawn from it; and this may be done at the close of the plaintiff's evidence or at the close of the whole evidence, and in exceptional cases at the close of the opening statement.

In their manner of instructing or charging the jury the federal courts have blazed out their own path, and are not governed by the state practice or statutes. Even a requirement of a state Constitution forbidding any charges to the jury as to matters of fact does not affect the federal courts;[50] nor does any other state practice or statute on the subject.[51]

Perhaps the most radical difference between the practice of the state and federal courts is along this line. In many

[49] Camden & S. R. Co. v. Stetson, 177 U. S. 172, 20 Sup. Ct. 617, 44 L. Ed. 721. *See "Courts," Dec. Dig. (Key-No.) § 351; Cent. Dig. § 924.*

[50] St. Louis, I. M. & S. R. Co. v. Vickers, 122 U. S. 360, 7 Sup. Ct. 1216, 30 L. Ed. 1161. *See "Courts," Dec. Dig. (Key-No.) § 352; Cent. Dig. § 927.*

[51] CITY OF LINCOLN v. POWER, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224; Knight v. Illinois Cent. R. Co., 180 Fed. 368, 103 C. C. A. 514; Steers v. U. S., 192 Fed. 1, 112 C. C. A. 423. *See "Courts," Dec. Dig. (Key-No.) § 352; Cent. Dig. § 927.*

state courts (especially in Virginia) the powers of the judge are restricted, so that he becomes hardly more than the moderator at a meeting. He cannot express the slightest opinion on questions of evidence, and in many states cannot give any instruction or charge to the jury unless it be reduced to writing. This is not the practice of the federal courts, and section 914, adopting the state practice, does not apply to this question. The judges in the federal courts have the right to comment on the evidence, and to discuss even its weight and credibility, provided only they let the jury understand that the final decision on all questions of fact is with them.[52]

Motion to Direct Verdict

It is the constant practice of the federal courts to direct a verdict. The circumstances under which they can direct it are carefully guarded, and they cannot do so when the evidence is conflicting.[53]

But where the facts are undisputed, or the preponderance is so great that the evidence practically becomes conclusive, and no reasonable men could differ as to the deductions to be drawn from it, then they can direct a verdict.[54]

In the Virginia practice, which probably is similar to that of many states, such a thing as directing a verdict is unheard of. The only method of taking advantage of the failure of the plaintiff to prove his case is by demurrer to evidence, with its attendant risks. The practice of the federal courts attains the same object, and still leaves the party who requests a direction of a verdict free to go before the jury in case the court should refuse. If the evidence is

[52] CITY OF LINCOLN v. POWER, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224; Freese v. Kemplay, 118 Fed. 428, 55 C. C. A. 258; Mead v. Darling, 159 Fed. 684, 86 C. C. A. 552. *See "Courts," Dec. Dig. (Key-No.) § 352; Cent. Dig. § 927.*

[53] White v. Van Horn, 159 U. S. 3, 15 Sup. Ct. 1027, 40 L. Ed. 55. *See "Courts," Dec. Dig. (Key-No.) § 352; Cent. Dig. § 927.*

[54] Southern Pac. Co. v. Pool, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 485; Louisville & N. R. Co. v. Roberts, 177 Fed. 922, 101 C. C. A. 202. *See "Courts," Dec. Dig. (Key-No.) § 532; Cent. Dig. § 927.*

such that the court would be bound to set aside a verdict in case one was rendered, then a federal court will save the litigants and itself the delays of a long trial, and will direct the jury to bring in a verdict.[55]

Time for Motion

Motions to direct a verdict in the federal courts may be made at any one of several stages. If the opening statement of counsel for the plaintiff states the evidence on which he expects to rely and in so doing shows that on such evidence he cannot recover, the court may, at the close of his statement, without going into any evidence at all, direct the jury to bring in a verdict; for it would be an idle ceremony and waste of time to allow a trial to proceed when it is a foregone conclusion that any verdict would have to be set aside.[56]

If, however, the defendant does not care to make this motion at that time, or if he makes it then, and fails, he can renew the motion at the end of the plaintiff's evidence. If the motion is sustained, that ends the case in his favor; if the motion is overruled, he has the choice of two methods: He may take an exception to the action of the court in overruling his motion, and submit no evidence, and go to the appellate court on the theory that the plaintiff's own evidence has failed to make out a case, and seek a reversal on that ground. If he considers this step too dangerous, he can then put on his own evidence, but when he does so he waives the benefit of any exception that he may have taken to the action of the court in refusing to direct a verdict at the end of the plaintiff's evidence, for it may well be that, though the plaintiff's evidence was not sufficient to sustain a verdict, the defendant's may have supplement-

[55] Sansom v. Railway Co., 111 Fed. 887, 50 C. C. A. 53. *See "Courts," Dec. Dig. (Key-No.) § 352; Cent. Dig. § 927.*

[56] Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539. *See "Courts," Dec. Dig. (Key-No.) § 352; Cent. Dig. § 927; "Trial," Dec. Dig. (Key-No.) § 173; Cent. Dig. § 397.*

ed it; and hence putting on evidence after the overruling of a motion to direct at the close of the plaintiff's evidence is held to be a waiver of such an exception. He can, however, give up the benefit of his assignment of error for failure to instruct at the close of the plaintiff's evidence and still renew his motion to the court to direct a verdict at the close of all the evidence in the case; and, in case this motion is overruled, he can take an exception to the action of the court and embody all the evidence in the bill of exceptions, on the theory that neither the plaintiff's nor defendant's evidence, nor both combined, are sufficient to sustain a verdict. The right to take these different steps is fully established by the authorities.[57]

SAME—SAME—BILL OF EXCEPTIONS

146. The bill of exceptions is the method of incorporating into the record errors of law not otherwise appearing therein.

In the form and other procedure relating to such bills the federal courts have their own rules, and do not regard the state practice.

The bill of exceptions must be formally written out and signed by the judge, but it need not be under seal.

The exception must be noted at the time the ruling objected to is made, and the bill of exceptions perfected during the term.

The exception must be specific, and taken as to the precise point objected to, and a separate exception must be taken to each objectionable ruling.

[57] Robertson v. Perkins, 129 U. S. 233, 9 Sup. Ct. 279, 32 L. Ed. 686; UNION PAC. R. CO. v. CALLAGHAN, 161 U. S. 91, 16 Sup. Ct. 493, 40 L. Ed. 628; Sigafus v. Porter, 179 U. S. 116, 21 Sup. Ct. 34, 45 L. Ed. 113; McCREA v. PARSONS, 112 Fed. 917, 50 C. C. A. 612. *See "Trial," Dec. Dig. (Key-No.) §§ 167, 172, 173; Cent. Dig. §§ 376-397.*

Section 953 of the Revised Statutes as amended in 1900, allowing bills of exception, has been set out in a previous connection.[58]

In order to constitute bills of exception, they must be formally written out and signed. Mere minutes or memoranda of notations of exceptions are not bills of exceptions in the sense of this statute.[59]

The bill must be signed by the judge who presided at the trial, but it need not be under seal.[60]

The last amendment allows another judge besides the judge who presided to sign the bill of exceptions in case of the sickness or disability of the judge who actually did preside. This, however, only applies to cases of actual disability, not to cases of mere absence from the district.[61]

In order to avail of a bill of exceptions to errors in ruling, the exception must be noted at the time the ruling is made, so as to give the judge the opportunity of correcting it if possible. If noted at that time, it may be actually written out and signed any time during the term.[62]

If an agreement is made to that effect during the term, it may be signed after the term.[63]

[58] Ante, p. 63.

[59] Hanna v. Maas, 122 U. S. 24, 7 Sup. Ct. 1055, 30 L. Ed. 1117. *See "Exceptions, Bill of," Dec. Dig. (Key-No.) § 20; Cent. Dig. §§ 21–28.*

[60] Generes v. Campbell, 11 Wall. 193, 20 L. Ed. 110; Malony v. Adsit, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163; Knight v. Illinois Cent. R. Co., 180 Fed. 368, 103 C. C. A. 514. *See "Exceptions, Bill of," Dec. Dig. (Key-No.) § 56; Cent. Dig. §§ 94–96.*

[61] Western Dredging & Improvement Co. v. Heldmaier, 111 Fed. 123, 49 C. C. A. 264. As to the meaning of "disability," see Thorndyke v. Gunnison, 174 Fed. 137, 98 C. C. A. 171; Sanborn v. Bay, 194 Fed. 37, 114 C. C. A. 57. See, also, Guardian Assur. Co. v. Quintana, 227 U. S. 100, 33 Sup. Ct. 236, 57 L. Ed. ——. *See "Exceptions, Bill of," Dec. Dig. (Key-No.) § 32; Cent. Dig. §§ 37–41, 94.*

[62] HUNNICUTT v. PEYTON, 102 U. S. 333, 26 L. Ed. 113; New York & N. E. R. Co. v. Hyde, 56 Fed. 188, 5 C. C. A. 461. *See "Exceptions, Bill of," Dec. Dig. (Key-No.) § 37; Cent. Dig. §§ 47, 48.*

[63] Waldron v. Waldron, 156 U. S. 361, 15 Sup. Ct. 383, 39 L. Ed. 453. *See "Exceptions, Bill of," Dec. Dig. (Key-No.) § 38; Cent. Dig. §§ 49–53.*

The trial judge may be compelled to sign a bill of exceptions by mandamus, provided it is a proper bill.[64]

In the form and other procedure relating to bills of exception the federal courts also have their own rules, and do not regard the state practice.[65]

The method of taking exceptions to instructions varies greatly in the federal and state courts. Certainly the difference between the federal practice and the practice in the state of Virginia is very great. Where the judge charges the jury, an exception will fall if it is taken to the whole charge, unless the entire charge is wrong. It is the duty of the exceptant to point out the special portions of the charge which he considers objectionable. So, too, as to instructions involving more than one proposition, he must indicate the special parts of the instruction to which he objects; otherwise his exception will fall. And he must take a separate exception to each instruction, or to each error of law involved in the instruction, and make each one the subject of a separate assignment of error.

These rules are essential to the proper maturing of a common-law case in the federal courts, if it is wished to review its proceeding in an appellate court.[66]

If a single exception is taken to the entire charge, and there is any part at all of the charge right, the exception falls.[67]

On the other hand, if a series of instructions is asked, and the court refuses them, and a bill of exceptions is taken

[64] In re CHATEAUGAY ORE & IRON CO., 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508. *See "Exceptions, Bill of," Dec. Dig. (Key-No.) § 53; Cent. Dig. §§ 80–88.*

[65] In re CHATEAUGAY ORE & IRON CO., 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508; Ghost v. U. S., 168 Fed. 841, 94 C. C. A. 253. *See "Courts," Dec. Dig. (Key-No.) § 356; Cent. Dig. § 937.*

[66] THOM v. PITTARD, 62 Fed. 232, 10 C. C. A. 352; South Penn Oil Co. v. Latshaw, 111 Fed. 598, 49 C. C. A. 478. *See "Courts," Dec. Dig. (Key-No.) § 356; Cent. Dig. § 937.*

[67] Western Assur. Co. v. Polk, 104 Fed. 649, 44 C. C. A. 104. *See "Trial," Dec. Dig. (Key-No.) § 281; Cent. Dig. § 694.*

to the action of the court in refusing them, the exception falls if any one of those instructions is wrong.[68]

SAME—SAME—VERDICT

147. The federal courts, though not compelled to do so, conform in a general way to the practice of the state courts in relation to the form of, and rules governing, the verdict; but they are not bound by state statutes requiring the courts to submit to the jury special questions of fact, and requiring the jury to make special findings in pursuance of such submissions.

As to the mere question of form, the federal courts follow the state court practice. So, too, where the state courts allow a single verdict on several counts, the federal courts will do the same.[69]

In many of the states there are laws requiring the courts to submit to the jury special questions of fact, and requiring the jury to make special findings in pursuance of such submissions. The federal courts have always refused to be bound by these statutes, considering that the control and handling of the jury is not a matter of practice, pleading, or procedure in the sense of section 914 of the Revised Statutes, but rather is a matter affecting the personal conduct and discretion of the judge, in which they will not permit state statutes to bind them.[70]

[68] Illinois Car & Equipment Co. v. Linstroth Wagon Co., 112 Fed. 737, 50 C. C. A. 504. *See "Trial," Dec. Dig. (Key-No.) § 281; Cent. Dig. § 694.*

[69] BOND v. DUSTIN, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835; Illinois Car & Equipment Co. v. Wagon Co., 112 Fed. 737, 50 C. C. A. 504; Glenn v. Sumner, 132 U. S. 152, 10 Sup. Ct. 41, 33 L. Ed. 301. *See "Courts," Dec. Dig. (Key-No.) § 352; Cent. Dig. § 927.*

[70] United States Mut. Acc. Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60; INDIANAPOLIS & ST. L. R. CO. v. HORST, 93 U. S. 291, 23 L. Ed. 898; Toledo, St. L. & W. R. Co. v. Reardon,

The federal court has power to amend a verdict in matters of form, and to receive a sealed verdict, and put it in proper form, when the parties had stipulated that the jury could send in their verdict sealed during a recess.[71]

SAME—MOTION FOR NEW TRIAL

148. The federal courts follow the usual practice of common-law courts in regard to new trials, and do not feel bound in this respect by state practice.

Section 269 of the Judicial Code provides in reference to the federal courts: "All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law." Here the federal courts decline to follow the state court practice, considering that the question as to granting or withholding a new trial is not a question of pleading, practice, or procedure.[72]

The granting or refusing of a new trial in the federal courts is a matter of discretion, and cannot be the subject of a bill of exceptions.[73]

159 Fed. 366, 86 C. C. A. 366. *See "Courts," Dec. Dig. (Key-No.) § 352; Cent. Dig. § 927.*

[71] Lincoln Tp. v. Cambria Iron Co., 103 U. S. 412, 26 L. Ed. 518; Koon v. Phœnix Mut. Life Ins. Co., 104 U. S. 106, 26 L. Ed. 670. But a court cannot before discharging a jury ask how they stand. Burton v. U. S., 196 U. S. 283, 25 Sup. Ct. 243, 49 L. Ed. 482. *See "Criminal Law," Dec. Dig. (Key-No.) § 864; "Trial," Dec. Dig. (Key-No.) § 340; Cent. Dig. §§ 795–799.*

[72] INDIANAPOLIS & ST. L. R. CO. v. HORST, 93 U. S. 291, 23 L. Ed. 898; Fishburn v. Chicago, M. & St. P. Ry. Co., 137 U. S. 60, 11 Sup. Ct. 8, 34 L. Ed. 585; Hughey v. Sullivan (C. C.) 80 Fed. 72. *See "Courts," Dec. Dig. (Key-No.) § 353; Cent. Dig. § 933.*

[73] Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085; Murhard Estate Co. v. Portland & S. R. Co., 163 Fed. 194, 90 C. C. A. 64. The court has power to put the successful party on terms as a condition of refusing a new trial. Darnell v. Krouse (C. C.) 134 Fed. 309; Daigneau v. Grand Trunk R. Co. (C. C.) 153 Fed. 593. *See*

There is one important qualification of the above doctrine that the federal courts do not follow the state court practice in reference to new trials. Some states have laws giving a new trial as an absolute matter of right in certain classes of cases, mainly involving title to real estate. Where such a law exists, the federal courts will follow it in cases pending on their common-law side, and will grant a new trial under these circumstances.[74]

SAME—MOTION IN ARREST OF JUDGMENT

149. The practice of the federal courts in respect to motions in arrest of judgment corresponds to the general common-law doctrine.

A motion in arrest of judgment under section 954, which is the federal statute of jeofails, will not lie for a variance, nor on account of mere matters of fact, nor for mere defects of form, but only for substantial and irremediable defects in the cause of action.[75]

SAME—JUDGMENT

150. At this point, as far as questions of practice, pleading, or procedure are concerned, section 914 of the Revised Statutes, assimilating the federal to the state practice, no longer applies; proceedings subsequent to the judgment being the dividing line.[76]

"Appeal and Error," Dec. Dig. (Key-No.) § 977; Cent. Dig. §§ 3860–3865.

[74] Smale v. Mitchell, 143 U. S. 99, 12 Sup. Ct. 353, 36 L. Ed. 90. *See "Courts," Dec. Dig. (Key-No.) § 353; Cent. Dig. § 933.*

[75] Adams v. Shirk, 104 Fed. 54, 43 C. C. A. 407; Id., 117 Fed. 801, 55 C. C. A. 25; Peden v. Bridge Co. (C. C.) 120 Fed. 523; American Bridge Co. v. Peden, 129 Fed. 1004, 64 C. C. A. 580. *See "Judgment," Dec. Dig. (Key-No.) §§ 259–266; Cent. Dig. §§ 457–499.*

[76] Detroit United Ry. v. Nichols, 165 Fed. 289, 91 C. C. A. 257. *See "Courts," Dec. Dig. (Key-No.) § 355; Cent. Dig. §§ 935, 936.*

While the federal courts will follow the state practice as to the mere form of the judgment, their control over it from that time forward is regulated by the federal decisions and statutes, and not by the state practice. They may correct the record, after the term, in mere clerical errors, but in no other way.[77]

Under the federal practice and decisions a judgment cannot be set aside after the term during which it is rendered, though the statute of the state may provide summary remedies by motion for the purpose of regulating judgments in its own courts.[78]

It is hard to reconcile with the authorities last cited the case of Travelers' Protective Ass'n v. Gilbert.[79] There the court held that it could adopt a state remedy by motion for the reopening of a judgment, and that, when such a right existed in the state practice, it took away from the federal courts their equitable jurisdiction for the reopening or setting aside of judgments. Both these propositions are inconsistent with the above case of Bronson v. Schulten, in which the court says that, independent of these state statutes allowing the correction of judgments by motion, the power to regulate judgments after the term in which they were rendered was an equitable power. Nothing is better settled in federal law than the doctrine that the ancient equitable jurisdiction possessed by the federal courts remains with them despite newer remedies given by state statutes. The states cannot defeat the federal jurisdiction

[77] City of Manning v. Insurance Co., 107 Fed. 52, 46 C. C. A. 144; Home St. Ry. Co. v. Lincoln, 162 Fed. 133, 89 C. C. A. 133. But they may during the term. Southern P. Co. v. Kelley, 187 Fed. 937, 109 C. C. A. 659. *See "Courts," Dec. Dig. (Key-No.) § 354; Cent. Dig. § 934.*

[78] BRONSON v. SCHULTEN, 104 U. S. 410, 26 L. Ed. 997; City of Manning v. Insurance Co., 107 Fed. 52, 46 C. C. A. 144; Tubman v. Baltimore & O. R. Co., 190 U. S. 38, 23 Sup. Ct. 777, 47 L. Ed. 946; Menge v. Warriner, 120 Fed. 816, 57 C. C. A. 432. *See "Courts," Dec. Dig. (Key-No.) § 354; Cent. Dig. § 934.*

[79] 111 Fed. 269, 49 C. C. A. 309, 55 L. R. A. 538. *See "Courts," Dec. Dig. (Key-No.) § 354; Cent. Dig. § 934.*

in equity on the ground that an adequate remedy exists at law by legislation prescribing remedies at law, though those remedies were simpler than the equitable remedy.[80]

The state law is not only inapplicable on questions as to the method of setting aside judgments by the court which rendered them, but, a fortiori, it is still less applicable to proceedings for the review of a judgment.[81]

The act of August 1, 1888,[82] provides as follows:

"That judgments and decrees rendered in a circuit or district court of the United States within any state, shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state: provided, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the state of Louisiana before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state."

Under this act it has been held that, in case the state where the federal court sits permits or requires its officers to docket federal judgments, a judgment of the federal court is not a lien on lands in every county of the district, but is only a lien in the special county where the court is

[80] Post, p. 419.

[81] West v. East Coast Cedar Co., 113 Fed. 737, 51 C. C. A. 411; Friedly v. Giddings (C. C.) 119 Fed. 438; Giddings v. Freedley, 128 Fed. 355, 63 C. C. A. 85, 65 L. R. A. 327; Knight v. Illinois Cent. R. Co., 180 Fed. 368, 103 C. C. A. 514. *See "Courts," Dec. Dig. (Key No.) § 356; Cent. Dig. § 937; "Appeal and Error," Cent. Dig. § 3397.*

[82] U. S. Comp. St. 1901, p. 701.

sitting, unless it is also docketed in the state clerk's office of the other counties.[83]

A judgment in the federal courts is not a lien on property of the debtor fraudulently conveyed by a conveyance good as between the debtor and the fraudulent grantee, and dated previous to the judgment.[84]

The authorities bearing on the lien of federal judgments are well collated in the footnote to Blair v. Ostrander.[85]

SAME—EXECUTION

151. State remedies in the nature of execution in force on June 1, 1872, and any later ones adopted by rule of court, are available in the federal courts in common-law causes.

In reference to executions, section 916 of the Revised Statutes [86] provides:

"The party recovering a judgment in any common-law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in

[83] Dartmouth Sav. Bank v. Bates (C. C.) 44 Fed. 546. *See "Judgment," Dec. Dig. (Key-No.) § 778; Cent. Dig. § 1339.*

[84] Luhrs v. Hancock, 181 U. S. 567, 21 Sup. Ct. 726, 45 L. Ed. 1005. *See "Judgment," Dec. Dig. (Key-No.) § 779; Cent. Dig. §§ 1340, 1342.*

[85] 47 L. R. A. 469; Id., 109 Iowa, 204, 80 N. W. 330, 77 Am. St. Rep. 532. See, also, Great Falls Nat. Bank v. McClure, 176 Fed. 208, 99 C. C. A. 562. A state statute of limitations to the enforcement of judgments applies in the federal courts. General Electric Co. v. Hurd (C. C.) 171 Fed. 984. *See "Courts," Dec. Dig. (Key-No.) § 354; Cent. Dig. § 934.*

[86] U. S. Comp. St. 1901, p. 684.

force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

Under this statute only the remedies in the state court in the nature of an execution which were in existence when that statute was passed—that is, on June 1, 1872—are available in the federal courts, unless the federal court has by rule adopted subsequent state legislation on the subject.[87]

Under section 985 of the Revised Statutes [88] executions of the federal court may run into another district of the same state. Under section 987 [89] the court has power to grant a stay of execution for certain purposes.[90]

Section 990 of the Revised Statutes [91] provides as follows:

"No person shall be imprisoned for debt in any state, on process issuing from a court of the United States, where, by the laws of such state, imprisonment for debt has been or shall be abolished. And all modifications, conditions, and restrictions upon imprisonment for debt, provided by the laws of any state, shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of such state." [92]

Under section 993,[93] any appraisement of goods taken

[87] Canal & C. Streets R. Co. v. Hart, 114 U. S. 654, 5 Sup. Ct. 1127, 29 L. Ed. 226; Lamaster v. Keeler, 123 U. S. 376, 8 Sup. Ct. 197, 31 L. Ed. 238. *See "Courts," Dec. Dig. (Key-No.) § 354; Cent. Dig. § 934.*

[88] U. S. Comp. St. 1901, p. 707.

[89] U. S. Comp. St. 1901, p. 708.

[90] Eaton v. Cleveland, St. L. & K. C. R. Co. (C. C.) 41 Fed. 421; Sanborn v. Bay, 194 Fed. 37, 114 C. C. A. 57. *See "Courts," Dec. Dig. (Key-No.) § 356; Cent. Dig. § 937; "Appeal and Error," Dec. Dig. (Key-No.) § 460.*

[91] U. S. Comp. St. 1901, p. 709.

[92] In re Bergen, 2 Hughes, 513, Fed. Cas. No. 1,338; Stroheim v. Delmel, 77 Fed. 802, 23 C. C. A. 467; Hayes v. Canada, A. & P. S. S. Co., 184 Fed. 821, 108 C. C. A. 175. *See "Courts," Dec. Dig. (Key-No.) § 355; Cent. Dig. § 936.*

[93] U. S. Comp. St. 1901, p. 709.

on a writ of execution which is required by the state laws must be followed by the federal courts. The federal courts also have power to set aside sales under writs of execution. Mere inadequacy of price alone would not result in a resale; but where the inadequacy is so gross as to shock the conscience, and especially where unfair and questionable methods have been resorted to, the court will not hesitate to set the sale aside.[94]

The act of March 3, 1893,[95] lays down important rules in reference to the sale of property under orders of the federal court. It can, however, be best discussed in connection with the chancery procedure of the federal courts.

[94] SCHROEDER v. YOUNG, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. Ed. 721. *See "Execution," Dec. Dig. (Key-No.) §§ 250, 251; Cent. Dig. §§ 697-716.*

[95] U. S. Comp. St. 1901, p. 710.

CHAPTER XIX

PROCEDURE IN THE ORDINARY FEDERAL COURTS OF ORIGINAL JURISDICTION (Continued) COURTS OF EQUITY.

152. General Limits of Equitable Jurisdiction.
153. The Equity Procedure in the Federal Courts—How Regulated.
154. Same—Pleading—General Requisites of Bill.
155. Same—Same—Injunction Bills.
156. Same—Same—Judges who may issue injunctions.
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159. Same—The Process.
160. Same—Defaults.
161. Same—The Defense—Motions.

GENERAL LIMITS OF EQUITABLE JURISDICTION

152. The general limits of the equitable jurisdiction of the federal courts are those that prevailed in the High Court of Chancery in England at the time of the adoption of the Constitution of the United States.

The distinction between law and equity in the federal courts is made in the Constitution itself, and naturally the jurisdiction in equity which the framers of the Constitution had in mind was that jurisdiction as it prevailed at the time when the Constitution was adopted.[1]

It is practically the jurisdiction of the High Court of Chancery in England as it then existed.[2]

Section 267 of the Judicial Code provides as follows:

"Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

[1] Vattier v. Hinde, 7 Pet. 252, 8 L. Ed. 675. *See "Courts," Dec. Dig. (Key-No.) § 335; Cent. Dig. §§ 902–907½.*

[2] Ante, p. 223.

This section is declaratory of the law as it existed at the time when the Constitution was adopted. It is measured by the subjects over which courts of equity had jurisdiction at that time, and, as state courts can neither enlarge nor diminish the jurisdiction of the federal courts, it is not affected by the fact that under subsequent legislation a statutory remedy is given which is as good as the equitable remedy. Such legislation does not narrow the jurisdiction of the federal courts in equity.[3]

Even in the federal courts the single fact that there is a remedy at law is not sufficient to oust the courts of their equitable jurisdiction. It must be as full, adequate, and complete as the equitable remedy.[4]

But while the state statutes cannot enlarge or restrict the equitable jurisdiction of the federal courts by making a matter a case of equity cognizance which is not so under the practice of the English High Court of Chancery, the federal courts can avail of any new remedy in the nature of an equitable remedy given for the enforcement of a right which is equitable in its nature.[5]

An equity court has no jurisdiction, however, to give a direct decree against the obligors on a bond given for release of property or other purposes incidental to a chancery suit. It leaves the parties to their remedy at law.[6]

[3] **Mississippi Mills v. Cohn, 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052; ante, p. 224.** ***See "Courts," Dec. Dig. (Key-No.) § 259; Cent. Dig. §§ 795, 796.***

[4] **Arrowsmith v. Gleason, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630; Empire Circuit Co. v. Sullivan (C. C.) 169 Fed. 1009; Rumbarger v. Yokum (C. C.) 174 Fed. 55.** ***See "Courts," Dec. Dig. (Key-No.) § 262; Cent. Dig. § 797.***

[5] **Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52; Farr v. Hobe-Peters Land Co., 188 Fed. 10, 110 C. C. A. 160.** ***See "Courts," Dec. Dig. (Key-No.) § 335; Cent. Dig. § 907.***

[6] **Bein v. Heath, 12 How. 168, 13 L. Ed. 939; Phillips v. Gilbert, 101 U. S. 721, 25 L. Ed. 833.** ***See "Courts," Dec. Dig. (Key-No.) § 335; Cent. Dig. § 902.***

THE EQUITY PROCEDURE IN THE FEDERAL COURTS—HOW REGULATED

153. The equity procedure of the federal courts is independent of that in the state courts. The federal courts, in this branch of their jurisdiction, have their own rules and practice. These rules are in accordance with the practice in equity that prevailed at adoption of the federal Constitution as modified by a code of rules laid down by the Supreme Court of the United States under authority of law, together with certain rules of the lower federal courts regulating details of their own procedure.

The rules of procedure are prescribed by the Supreme Court under authority of sections 913 and 917 of the Revised Statutes,[7] which provide as follows:

"The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules, and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States."

"The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other pro-

[7] U. S. Comp. St. 1901, pp. 683, 684.

cess, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the circuit and district courts."

Under authority conferred by these statutes the Supreme Court at its February term, 1822, prescribed thirty-three rules to regulate the equity practice of the federal courts of first jurisdiction.[8] Subsequent thereto, at the January term, 1842, these rules were much enlarged, and were increased in number to ninety-two.[9]

Since that time three others have been added. One is in reference to giving a personal decree against the mortgagor under certain circumstances in a foreclosure suit, which was promulgated at the December term, 1863.[10] Another one gave the judge who took part in a decision granting or dissolving an injunction a certain discretion as to suspending or modifying an injunction during the pendency of an appeal. It was promulgated at the October term, 1878.[11] And the last was intended to prevent collusive suits by stockholders for causes of action which should be asserted in the first instance by the directors or managing officers of a corporation. It was promulgated at the October term, 1881.[12]

These rules remained in force until November 4, 1912, when the Supreme Court promulgated a new draft which went into effect February 1, 1913. This draft changed the old ones so radically as practically to constitute a new system and render obsolete a great mass of decisions construing the old ones.[13]

[8] 7 Wheat. xvii.
[9] 1 How. xii.
[10] 1 Wall. v.
[11] 97 U. S. vii.
[12] 104 U. S. ix.
[13] See 33 Sup. Ct. xx.

The right of Congress to authorize the adoption of these rules by the courts has been upheld.[14]

The courts, however, can only regulate procedure under this power; they cannot, under the guise of a rule, affect the jurisdiction of the courts.[15]

Under old rule 90 the practice of the federal courts in cases not covered by the rules is "the present practice of the High Court of Chancery in England." Although, as has been seen above, the question of jurisdiction in equity depends upon the English jurisdiction of the equity courts, as it was at the time of the Constitution, or the enactment of the judiciary act immediately after the adoption of the Constitution, yet, as regards questions of practice, this rule meant to adopt the practice of the High Court of Chancery as it existed at the time the rules were adopted. That was in 1842.[16]

In Thomson v. Wooster[17] the Supreme Court calls attention to the fact that the best exponent of the English practice is the edition of Daniell's Chancery Practice issued in the year 1837. It also recommends Smith's Chancery Practice as valuable for the same purpose. It may be added that the first edition of Story's Equity Pleading was published about this same time. A companion work to this is Curtis' Equity Precedents.

In the recent revision, old rule 90, adopting the practice of the English High Court of Chancery as of 1842, is omitted. This omission, however, cannot change the fact

[14] Wayman v. Southard, 10 Wheat. 1, 42, 6 L. Ed. 253. *See "Courts," Dec. Dig. (Key-No.) §§ 258, 259; Cent. Dig. §§ 793, 795.*

[15] The St. Lawrence, 1 Black, 522, 17 L. Ed. 180; In re Phenix Ins. Co., 118 U. S. 610, 7 Sup. Ct. 25, 30 L. Ed. 274. *See "Courts," Dec. Dig. (Key-No.) §§ 78–80, 332; Cent. Dig. §§ 274–292, 911.*

[16] THOMSON v. WOOSTER, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105; Badger v. Badger, Fed. Cas. No. 717. *See "Courts," Dec. Dig. (Key-No.) § 335; Cent. Dig. §§ 902–907½.*

[17] THOMSON v. WOOSTER, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105. *See "Courts," Dec. Dig. (Key-No.) § 335; Cent. Dig. §§ 902–907½.*

that section 913, just quoted, requires the practice to be "according to the principles, rules, and usages which belong to courts of equity," except as changed by statute or rule. As we get these "principles, rules, and usages" from the mother country, we must still look to the standard authorities in matters not controlled by rule.

Under section 918 of the Revised Statutes,[18] the district courts can prescribe rules of practice not inconsistent with the rules of the Supreme Court, but by rule 79 a majority of the circuit judges for the circuit must concur in their adoption.

SAME—PLEADING—GENERAL REQUISITES OF THE BILL

154. The ancient form of bills in equity has been much simplified in the federal equity rules by authorizing the omission of formal averments and abbreviating the method of stating the cause of action. But it must show

(a) The jurisdiction of the court as a federal court.

(b) The jurisdiction of the court as an equity court.

The bill must be signed by counsel as a pledge of good faith.

The first step in the institution of an equity suit in the federal courts is filing the bill.

Its general form is the subject of the twenty-fifth rule. Any bill in equity in the federal courts must, independent of its special character, embody two essentials: First, it must show the jurisdiction of the court as a federal court; and second, it must show the jurisdiction of the court as an equity court.

[18] U. S. Comp. St. 1901, p. 685.

Federal Jurisdiction

The allegations necessary to show its jurisdiction as a federal court have been discussed in connection with the general jurisdiction of the federal courts.[19] It must show in general the citizenship of the parties, if that is the ground of the jurisdiction; the federal question involved, if that is the ground of jurisdiction; the amount involved, if that is an essential element of jurisdiction; and the residence. These are covered by the first two paragraphs of the twenty-fifth rule.

Equity Jurisdiction

In showing the jurisdiction of the court as an equity court, the general rules of chancery pleading and practice apply; but they are beyond the range of this treatise. It was once said that a bill in chancery contained a story thrice told. Under the equity rules, however, many of the allegations customary in the old English bills in chancery may be omitted, though they are still frequently inserted, apparently for no other reason than that lawyers, when they prepare bills, follow blindly the old form books.

The only thing necessary is in the language of the twenty-fifth rule, "a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence."

The bill should ask the special relief desired, and contain a prayer for general relief. Under the latter prayer any relief may be granted consistent with the facts stated, although it is not specially prayed for.[20]

If it asks special relief pending the suit, it must be sworn to.

Parties

On account of the constant inconvenience experienced in the federal courts from inability to make the proper par-

[19] Ante, p. 218 et seq.

[20] Hobson v. McArthur, 16 Pet. 182, 10 L. Ed. 930; Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82. *See "Equity," Dec. Dig. (Key-No.) § 427; Cent. Dig. §§ 1001–1014.*

ties, it is provided by rule 25 that, in case persons appearing to be proper are not made parties, the bill must show that they are out of the jurisdiction, or cannot be joined without ousting the jurisdiction. It has been shown in a previous connection that this does not authorize a bill where the parties omitted from it are so essential that no proper decree can be made in their absence.[21]

Signature of Counsel

Under rule 24 every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him, that upon the instructions laid before him regarding the case there is good ground for the same, that no scandalous matter is inserted in the pleading, and that it is not interposed for delay.

This signature of counsel is intended as a pledge of good faith. A bill which does not contain it is defective, though an indorsement by counsel will be treated as a signature.[22]

A bill which is not signed by counsel will be ordered off the rolls, but if it is signed the court will permit it to be restored to the rolls, though in that case it is practically a new bill, and does not relate back to the time of its first filing.[23]

Impertinent Matter

It is an inherent power of courts of equity to protect their own records, and to guard litigants from unnecessary and irrelevant attacks. Hence a bill which is rambling and prolix may be ordered off the files. If it contains any scandalous or impertinent matter, the court will act all the

[21] Ante, p. 256 et seq.

[22] Dwight v. Humphreys, Fed. Cas. No. 4,216. *See "Equity," Dec. Dig. (Key-No.) § 311; Cent. Dig. § 613.*

[23] Roach v. Hulings, Fed. Cas. No. 11,874. *See "Equity," Dec. Dig. (Key-No.) § 311; Cent. Dig. § 613.*

more quickly; and under rule 21 it can in such case act on its own motion.[24]

Parties

The suit should be prosecuted in the name of the real party in interest, and any person may be a defendant who has or claims an interest adverse to the plaintiff. Rules 37, 38, and 39 contain liberal provisions for suits in a representative capacity, for interventions, and for omission of absent parties who would defeat the jurisdiction.

Interrogatories

Under the old rules the plaintiff could propound interrogatories to the defendant, annexing them to his bill; but the defendant could not return the compliment, his only remedy being a bill of discovery.[25]

The new rules in this respect are more flexible. Rule 58 allows either to propound interrogatories to the other, under judicious restrictions as to time, contents, and enforcement. It is so liberal in its provisions as to obviate the necessity for bills of discovery.

SAME—SAME—INJUNCTION BILLS

155. Injunction proceedings are instituted by the filing of a bill followed by an order to show cause. In exceptional cases, where it is necessary to preserve the status quo, the court will issue a temporary restraining order.

The injunction bill must be sworn to.

The injunction remedy is an extraordinary one, and such relief should not be granted unless it is necessary for the protection of the plaintiff's rights.

[24] Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14. *See "Equity," Dec. Dig. (Key-No.) § 151; Cent. Dig. §§ 380–382.*

[25] Oro Water, Light & Power Co. v. Oroville (C. C.) 162 Fed. 975. *See "Courts," Dec. Dig. (Key-No.) § 351; Cent. Dig. § 924; "Equity," Dec. Dig. (Key-No.) § 140; Cent. Dig. §§ 317, 318.*

The practice on bills praying special relief, like injunction bills, is carefully regulated by the federal statutes and rules. A bill for an injunction should always be sworn to, though this is not necessary in ordinary bills. When filed, the proper practice is to issue a rule to show cause why the injunction should not be granted, and name a day for the hearing of such a rule. The remedy by injunction is an extraordinary remedy, and in theory such relief should not be granted unless it is necessary for the protection of the plaintiff's rights. It should never be granted merely because it will do no harm.[26]

Equity rule 73 (corresponding to old rule 55, but much stricter) provides:

"No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall pro-

[26] Ladd v. Oxnard (C. C.) 75 Fed. 703; American Cereal Co. v. Eli Pettijohn Cereal Co., 76 Fed. 372, 22 C. C. A. 236; Teller v. U. S., 113 Fed. 463, 51 C. C. A. 297. *See "Injunction," Dec. Dig. (Key-No.) §§ 136, 137; Cent. Dig. §§ 305–309.*

ceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office."

And this notice is necessarily implied by section 263 of the Judicial Code,[27] which reads as follows:

"Whenever notice is given of a motion for an injunction out of a district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge."

When the effect of issuing a rule to show cause without any preventive process would be that it would leave the defendant free to change the status quo, the court, in its discretion, may issue a temporary restraining order. The sole purpose of this order, however, in contemplation of the statutes regulating the subject, is to preserve the status quo. It is necessarily ex parte in its nature, and can be made an instrument of great oppression; for by such an order the defendant is often compelled to take action going beyond the mere preservation of the status quo. It is practically condemning him unheard.[28]

Thus the theory as to issuing injunctions in the federal courts is simple, and thoroughly settled both by the statutes and decisions. It is, in the first place, the filing of the bill and the issuing of an order to show cause; in the next place, the issuing of a temporary restraining order in

[27] See, also, Mowrey v. Indianapolis & C. R. Co., Fed. Cas. No. 9,891. *See "Injunction," Dec. Dig. (Key-No.) § 143; Cent. Dig. § 315.*

[28] Fanshawe v. Tracy, Fed. Cas. No. 4,643; Walworth v. Cook Co., Fed. Cas. No. 17,136; Cohen v. Delavina (C. C.) 104 Fed. 946; Miller v. Mutual Reserve Fund Life Ass'n (C. C.) 109 Fed. 278; North American Land & Timber Co. v. Watkins, 109 Fed. 101, 48 C. C. A. 254; Barstow v. Becket (C. C.) 110 Fed. 826; United Railroads of San Francisco v. San Francisco (C. C.) 180 Fed. 948; Blacklock v. U. S., 208 U. S. 75, 28 Sup. Ct. 228, 52 L. Ed. 396. *See "Injunction," Dec. Dig. (Key-No.) § 143; Cent. Dig § 315.*

the exceptional cases where that order is necessary to preserve the status quo. It must be confessed, however, that the practice of the courts does not always accord with the theory. It is not uncommon to turn the temporary restraining order into an order that is in all respects the equivalent of an ex parte injunction order. Thus the good nature of judges and pertinacity of counsel often change the established practice, and not always with the effect of furthering the ends of justice.

SAME—SAME—JUDGES WHO MAY ISSUE INJUNCTIONS

156. Injunctions may be issued by Supreme Court justices or district judges, and in exceptional cases by circuit judges.

Section 264 of the Judicial Code provides what judges may issue injunctions. It reads:

"Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any judge of a district court in cases where they might be granted by such court. But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the district judge of the district. In case of the absence from the district of the district judge, or of his disability, any circuit judge of the circuit in which the district is situated may grant an injunction or restraining order in any case pending in the district court, where the same might be granted by the district judge."

Under this the Supreme Court judges issue injunctions only in exceptional cases.[29]

SAME—SAME—INJUNCTIONS TO STATE COURTS

157. The federal courts may issue injunctions to the parties in state courts:

(a) In limited liability proceedings.

(b) In bankruptcy proceedings.

(c) Whenever it becomes necessary to protect their own jurisdiction previously acquired, or

(d) When an injunction is necessary to relief in a case in which it has had prior jurisdiction.

Criminal proceedings in a state court will not be enjoined.

Section 265 of the Judicial Code provides as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

Notwithstanding the general language of this provision, a federal court will refrain from issuing injunctions to state courts only when the state court has first acquired jurisdiction.[30]

But it will issue injunctions to the state courts, or rather to the parties, wherever it is necessary to protect its own jurisdiction previously acquired, or when necessary to relief in a case of which it has had prior jurisdiction.[31]

[29] Searles v. Jacksonville, P. & M. R. Co., 2 Woods, 621, Fed. Cas. No. 12,586. *See "Courts," Dec. Dig. (Key-No.) § 262; Cent. Dig. § 797.*

[30] In re Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933; MORAN v. STURGES, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981; Kansas City Gas Co. v. Kansas City (D. C.) 198 Fed. 500. *See "Courts," Dec. Dig. (Key-No.) §§ 260, 282, 508; Cent. Dig. §§ 1418–1430.*

[31] Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. Ed. 497. *See "Courts," Dec. Dig. (Key-No.) § 508; Cent. Dig. §§ 1418–1430.*

The prohibition against injunctions to the state courts applies not simply to the courts or their officers, but to the parties as well. A federal court will not enjoin the parties from a proceeding in a state court any more than it will enjoin the court officers.[32]

Criminal proceedings in a state court will not be enjoined.[33]

This statute was first pased in 1793. The limited liability act of 1851 is not affected by it, and the federal courts will issue injunctions to state courts under that act to prevent vessel owners from being proceeded against in the state courts.[34]

The right to issue injunction proceedings in bankruptcy cases is expressly reserved by this act; in fact, it is allowable to enjoin proceedings in state courts which contravene the provisions of the bankrupt act even by such summary process as by rule to show cause.[35]

SAME—SAME—INJUNCTIONS TO STATE OFFICIALS OR BOARDS

158. Injunctions to state officials or boards intended to question the constitutionality of state statutes can only be issued by a court of three judges, a majority of whom must concur, and after five days' no-

[32] Wagner v. Drake (D. C.) 31 Fed. 849; Dial v. Reynolds, 96 U. S. 340, 24 L. Ed. 644. *See "Courts," Dec. Dig. (Key-No.) § 508; Cent. Dig. §§ 1418–1430.*

[33] Harkrader v. Wadley, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399. *See "Courts," Dec. Dig. (Key-No.) § 508; Cent. Dig. §§ 1418–1430.*

[34] Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 3 Sup. Ct. 379, 27 L. Ed. 1038; MORAN v. STURGES, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981; In re Whitelaw (D. C.) 71 Fed. 733. *See "Courts," Dec. Dig. (Key-No.) § 508; Cent. Dig. §§ 1393, 1418–1430.*

[35] White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183. *See "Bankruptcy," Dec. Dig. (Key-No.) § 217; Cent. Dig. §§ 323, 330, 340; "Courts," Cent. Dig. § 1424.*

tice. A temporary restraining order may issue, and the case is expedited in every way possible, both in the inferior and appellate court.

Section 266 of the Judicial Code is an addition to pre-existing law. As amended March 4, 1913 (37 Stat. 1013, c. 160), it reads:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: Provided, however, that one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days notice of the hearing has been given to the governor and to the attorney general of the state, and to such other persons as may be defendants in the suit: Provided, that if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the

Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the state having jurisdiction thereof under the laws of such state, to enforce such statute or order, accompanied by a stay in such state court of proceedings under such statute or order pending the determination of such suit by such state court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the state. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the state, that the suit in the state courts is not being prosecuted with diligence and good faith." This act applies only to state statutes and state officers, not to municipal ordinances or municipal officers.[36]

[36] Cumberland Telephone & Telegraph Co. v. Memphis (D. C.) 198 Fed. 955. *See "Courts," Dec. Dig. (Key-No.) §§ 102, 508.*

SAME—THE PROCESS

159. Process issues upon the filing of the bill. It is usual to file with the clerk a præcipe for process. A general appearance is a waiver of issuance or service of process.

Service of process must be in accordance with equity rule 13, and the return must show such service.

Form of Process

On filing the bill the process issues. It is usual to file with the clerk a præcipe for process, and not to rely upon him to issue it merely because it is prayed in the bill. In fact this is implied from the language of rule 12, which provides that whenever a bill is filed, and not before, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff. It contains the names of the parties, and is returnable into the clerk's office twenty days from the issuing thereof. At its bottom is a memorandum that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken pro confesso.

As the object of the issuance and service of process is to notify the defendant of the proceedings against him, it is unnecessary in case the defendant on hearing of the proceeding voluntarily appears. A general appearance on his part is a waiver of the issuance or service of process.[87]

Service of Process

Equity rule 13 provides as follows:

"The service of all subpœnas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode

[87] Seattle L. S. & E. R. Co. v. Union Trust Co., 79 Fed. 179, 24 C. C. A. 512. *See "Courts," Dec. Dig. (Key-No.) § 345; Cent. Dig. § 917.*

of each defendant, with some adult person who is a member of or resident in the family."

As notice of suit is essential to the defendant in order to enable him to protect himself, the provisions as to service must be carefully obeyed, and the return must show that they have been so obeyed. Hence, where the return was to the effect that the service had been made on an adult person, who resided in the defendant's place of abode, the court held it insufficient. It was also held that the return must show that the party on whom it was served was a member or resident in the family of the defendant, not merely an adult resident in the defendant's place of abode, as such a person might be a mere stranger, like a guest at a hotel, for instance, if the defendant resided at a hotel.[38] The service need not necessarily be in a dwelling house, and hence a service was upheld which was made in a grocery store in a dwelling house which was all one building, and the party who kept the store lived upstairs.[39]

A process of subpœna is necessary in order to bring the defendants into court, though other notices may have been served on them. For instance, where in an injunction bill, an order to show cause why the injunction should not be issued was served on the defendant, it was still held that process was necessary.[40]

Notwithstanding the provisions of this rule, substituted service is sometimes permissible. This is usually the case when the proceeding is ancillary to some other proceeding. In such case service may be made upon the plaintiff's attorney. But the record should show the necessity for such

[38] Blythe v. Hinckley (C. C.) 84 Fed. 228. But compare In re Risteen (D. C.) 122 Fed. 732; In re Norton (D. C.) 148 Fed. 301. *See "Equity," Dec. Dig. (Key-No.) § 123; Cent. Dig. §§ 296–302.*

[39] Phœnix Ins. Co. v. Wulf (C. C.) 1 Fed. 775. *See "Equity," Dec. Dig. (Key-No.) § 123; Cent. Dig. §§ 296–302.*

[40] Wheeler v. Walton & Whann Co. (C. C.) 65 Fed. 720. *See "Equity," Dec. Dig. (Key-No.) § 121; Cent. Dig. § 294.*

service, and an order of court should be obtained allowing it.[41]

It has also been seen in another connection that in case of certain proceedings to foreclose an equitable lien, service may be made by publication.[42]

Service under rule 15 must be made by the marshal or his deputy, or by some person specially appointed by the court for the purpose, in which latter case the person so appointed must make affidavit thereof.[43]

SAME—DEFAULTS

160. If the defendant does not appear and defend within the time required by the equity rules, the plaintiff may take a decree by default; in which case no proof is necessary if the allegations of the bill are sufficient as a basis for a decree.

The defendant is required by rule 16 to file his answer or other defense to the bill within the time named in the subpœna as required by rule 12, that is, on or before twenty days from service of process on him, on pain of having the bill taken for confessed and the cause heard ex parte.

And equity rule 17 provides as follows:

"When the bill is taken pro confesso the court may proceed to a final decree at any time after the expiration of thirty days after the entry of the order pro confesso, and such decree shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion

[41] Abraham v. North German Ins. Co. (C. C.) 37 Fed. 731, 3 L. R. A. 188; Gregory v. Pike, 79 Fed. 520, 25 C. C. A. 48. *See "Equity," Dec. Dig. (Key-No.) § 122; Cent. Dig. § 295.*

[42] Ante, p. 277 et seq.

[43] Hyman v. Chales (C. C.) 12 Fed. 855; Puleston v. U. S. (C. C.) 85 Fed. 570, 577. *See "Equity," Dec. Dig. (Key-No.) §§ 123, 124; Cent. Dig. §§ 296–303.*

and affidavit. No such motion shall be granted, unless upon the payment of the costs of the plaintiff up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause."

When the bill is so taken for confessed, the only questions left open are such questions as cannot be covered by the averments of the bill; as, for instance, the amount of damages in an infringement suit. The fact of infringement is no longer open.[44]

And after default no proof is necessary on the allegations of the bill, except as to matters of account or of similar character.[45]

If, however, the allegations of the bill themselves are insufficient to support a decree, a default cannot be entered even where no appearance or defense has been interposed.[46]

The default necessary to justify a decree by default is a default due to the failure of the defendant to appear and defend. If he has appeared and defended, the court cannot strike his answer from the files as a punishment for contempt, and then proceed against him as for a default. Such action would not be due process of law.[47]

If the defendant has appeared, though he has not defended, he is in court so far that he is entitled to notice of

[44] Reedy v. Western Electric Co., 83 Fed. 709, 28 C. C. A. 27. *See "Equity," Dec. Dig. (Key-No.) § 420; Cent. Dig. § 970.*

[45] THOMSON v. WOOSTER, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105; U. S. v. 650 Cases of Tomato Catsup (D. C.) 166 Fed. 73; Webster v. Oliver Ditson Co. (C. C.) 171 Fed. 895. *See "Equity," Dec. Dig. (Key-No.) § 420; Cent. Dig. § 970.*

[46] Wong Him v. Callahan (C. C.) 119 Fed. 381. *See "Equity," Dec. Dig. (Key-No.) § 420; Cent. Dig. § 970.*

[47] Hovey v. Elliott, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215; Barnes v. Trees (D. C.) 194 Fed. 230. Compare Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645. *See "Constitutional Law," Dec. Dig. (Key-No.) §§ 273, 312.*

any application for final decree even after default; for he has the right to be heard as to the form of final decree to be entered, though he may not care to defend on the merits.[48]

A final decree entered on a default cannot be set aside after the expiration of the term at which it is entered.[49]

If, however, the decree entered upon default is only interlocutory in its nature, it may be set aside at a subsequent term.[50]

But if the decree was entered by default in a case where the court had not acquired jurisdiction by service of process or otherwise, it may be set aside on motion even at a subsequent term, as it is no decree at all.[51]

This doctrine that a default decree, if final, cannot be set aside, must not be confounded with the right of the court under equity rule 69 to grant a rehearing in ordinary cases at any time during the succeeding term.[52]

[48] Bennett v. Hoefner, Fed. Cas. No. 1,320; Southern Pac. R. Co. v. Temple (C. C.) 59 Fed. 17; Davis v. Garrett (C. C.) 152 Fed. 723; Provident Life & Trust Co. of Philadelphia v. Camden & T. R. Co., 177 Fed. 854, 101 C. C. A. 68. These decisions were rendered under the old rules which required a formal appearance one rule day before the answer. The new rules do not require this, but there are many motions of a defendant that constitute an appearance; so that the reason of the decisions still holds good. *See "Equity," Dec. Dig. (Key-No.) § 422; Cent. Dig. §§ 932–949.*

[49] Austin v. Riley (C. C.) 55 Fed. 833; Stuart v. St. Paul (C. C.) 63 Fed. 644. *See "Equity," Dec. Dig. (Key-No.) § 430; Cent. Dig. §§ 1034–1047.*

[50] Blythe v. Hinckley (C. C.) 84 Fed. 228. *See "Equity," Dec. Dig. (Key-No.) § 430; Cent. Dig. §§ 1034–1047.*

[51] Eldred v. American Palace Car Co. of New Jersey (C. C.) 103 Fed. 209; Arredondo v. Cuebas y Arredondo, 223 U. S. 376, 32 Sup. Ct. 277, 56 L. Ed. 476. *See "Equity," Dec. Dig. (Key-No.) § 430; Cent. Dig. §§ 1034–1047.*

[52] MOELLE v. SHERWOOD, 148 U. S. 21, 13 Sup. Ct. 426, 37 L. Ed. 350. *See "Courts," Dec. Dig. (Key-No.) § 430; Cent. Dig. §§ 1034–1047.*

SAME—THE DEFENSE—MOTIONS

161. The defense is made by motion or answer, those appearing on the face of the bill or intended to question the jurisdiction being made by motion. Dilatory defenses may be made in the answer, and disposed of before the main trial.

Defenses involving a special appearance only should be made by motion to dismiss.

Perhaps the most radical change in the new rules is that abolishing demurrers and pleas, and substituting motions and answers. New rule 29 reads:

"Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree pro confesso entered."

Special Appearances

The implication of this language is that only defenses appearing on the face of the bill shall be made by motion to dismiss. But this cannot be the intent. There are some defenses which must be the subject of a special appearance,

and which depend on facts not appearing on the face of the bill. They could not be joined with defenses in the answer going to the merits; for a general and special appearance cannot in the nature of things be combined,[53] and it is not probable that the court intended to abrogate this doctrine.

A familiar example is an objection to the service of process. Another is an objection to the district of suit. These are questions of jurisdiction over the person, which cannot be combined with defenses to the merits. They do not appear on the face of the bill; for that shows nothing as to the service of process, and the district of the defendant's residence might be misstated. It is believed that such defenses must be made by motion even if its hearing involved the taking of testimony. Otherwise the rules do not provide for the case.

A question like the jurisdiction of the court as a federal court either over the subject-matter or person was raised by demurrer under the old rules if it appears from the facts stated in the bill itself.[54] Now it would be raised by motion to dismiss.

Matters in Bar—Legal Defenses

Under the old rules, legal defenses going to the merits and appearing on the face of the bill were raised by demurrer. Under the new rule above quoted, they are raised by motion to dismiss, and the hearing on such motion must proceed along lines similar to the old hearings on demurrer. But under the new rule they may also be raised in the answer.

[53] Jones v. Andrews, 10 Wall. 327, 19 L. Ed. 935. *See "Appearance," Dec. Dig. (Key-No.) § 23; Cent. Dig. § 114; "Equity," Dec. Dig. (Key-No.) § 127; Cent. Dig. § 306.*

[54] Southern Pac. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942. *See "Courts," Dec. Dig. (Key-No.) § 280; Cent. Dig. §§ 816–818; "Equity," Dec. Dig. (Key-No.) § 220; Cent. Dig. § 497.*

Instances of Defense Formerly Available by Demurrer, Now by Motion to Dismiss, or in the Answer

This is the proper way to raise the question that there is an adequate remedy at law. If the case asserted in the bill belongs to any general class of jurisdiction in which an equity court is competent to grant relief, the failure to make the point is a waiver of the right to set up that there is an adequate legal remedy.[55]

The defense that the plaintiff has been guilty of laches, or that his claim is barred by the statute of limitations, can be raised in the same way if the necessary facts appear on the bill.[56]

The defense that the bill does not show any equity is also available in this way, if appearing on the face of the bill. But the court will grant relief under such circumstances if, on any possible state of the evidence or the facts contained in the bill, it could give relief, though those facts may be stated vaguely.[57]

Two important additions to the old rules and practice are new rules 22 and 23. The first provides for transferring to the law side of the court a suit wrongly brought in equity, with only such change in the pleadings as is essential, and the second makes a similar provision as to a suit wrongly brought on the common-law side, and provides for hearing on common-law principles any common-law matter that may arise in an equity suit, without sending it to the common-law side.

[55] Brown, B. & Co. v. Lake Superior Iron Co., 134 U. S. 530, 10 Sup. Ct. 604, 33 L. Ed. 1021; Perego v. Dodge, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113; Metropolitan Ry. Receivership, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403; Acord v. Western Pocahontas Corporation (C. C.) 156 Fed. 989; Id., 174 Fed. 1019, 98 C. C. A. 625. *See "Equity," Dec. Dig. (Key-No.) § 220; Cent. Dig. § 497.*

[56] Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718; Thurmond v. Chesapeake & O. Ry. Co., 140 Fed. 697, 72 C. C. A. 191. *See "Equity," Dec. Dig. (Key-No.) § 223; Cent. Dig. § 502.*

[57] Pacific Live Stock Co. v. Hanley (C. C.) 98 Fed. 327; Failey v. Talbee (C. C.) 55 Fed. 892. *See "Equity," Dec. Dig. (Key-No.) § 223; Cent. Dig. § 502.*

No express procedure for raising this question is prescribed, but the natural way would be by motion, though there is no reason why it could not be combined with other defenses in the answer.

The same may be said as to new rule 26, which states the causes of action which may be joined in one bill.

Facts Admitted by Motion to Dismiss

A demurrer admits only facts well pleaded; not general statements or inferences or conclusions of law.[58] The same principle would apply to a motion raising questions apparent on the face of the bill.

Joinder of Issue on Motion

The only step necessary in order to join issue on a motion to dismiss is to have it set down for hearing, as allowed by the last sentence of rule 29. This requires five days' notice to the opposing party.

Decision on Motion

Under rule 29, if the motion is denied, the answer shall be filed within five days thereafter, or a decree pro confesso may be entered. This implies that the defendant is entitled to answer as of right; and it was so held under the old rule corresponding to rule 29.[59]

Amendments of Bill

If the motion goes to matters which are capable of amendment, the court in sustaining it will permit such amendment. The new rules are liberal in this respect. Rule 19 provides:

"The court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended, or material sup-

[58] Chicot County v. Sherwood, 148 U. S. 529, 13 Sup. Ct. 695, 37 L. Ed. 546; Equitable Life Assur. Soc. of United States v. Brown, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. Ed. 682. *See "Equity," Dec. Dig. (Key-No.) § 239; Cent. Dig. § 494.*

[59] Wooster v. Blake (C. C.) 7 Fed. 816. *See "Equity," Dec. Dig. (Key-No.) § 176; Cent. Dig. § 432.*

plemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

And rule 28 provides:

"The plaintiff may, as of course, amend his bill before the defendant has responded thereto, but if such amendment be filed after any copy has issued from the clerk's office, the plaintiff at his own cost shall furnish to the solicitor of record of each opposing party a copy of the bill as amended, unless otherwise ordered by the court or judge.

"After pleading filed by any defendant, plaintiff may amend only by consent of the defendant or leave of the court or judge."

This right to amend the bill after decision is discretionary with the court, and is not a matter of absolute right. If the plaintiff has been negligent about it, or has unduly delayed his request to amend, the court may, in its discretion, refuse him the right.[60]

[60] Mercantile Nat. Bank v. Carpenter, 101 U. S. 567, 25 L. Ed. 815; Edward P. Allis Co. v. Withlacoochee Lumber Co., 105 Fed. 680, 44 C. C. A. 673. *See "Equity," Dec. Dig. (Key-No.) § 271; Cent. Dig. §§ 558–560.*

CHAPTER XX

PROCEDURE IN THE ORDINARY FEDERAL COURTS OF ORIGINAL JURISDICTION (Continued)—COURTS OF EQUITY (Continued)

162. The Defense (Continued)—The Answer.
163. Same—Same—Joinder of Issue on.
164. The Proofs.
165. Same—Testimony by Deposition, before Examiners.
166. Same—Testimony by Deposition under Statutes.
167. References.
168. The Decree—Form of.
169. Same—Its Enforcement.
170. Same—Reopening of Decree.

THE DEFENSE (Continued)—THE ANSWER

162. The answer is the method of setting up defenses of fact, and also such defenses of law as may be made by motion to dismiss, and are not required to be set up by a special appearance.

An answer, so far it is responsive to the bill, has probative force, if under oath, and is conclusive unless contradicted by two witnesses or one witness and strong corroborating circumstances.

Equity rule 30 provides:

"The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic or other person non

compos and not under guardianship, but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims."

An answer in equity, if under oath, and responsive to the charges of the bill, is more than a simple pleading putting facts in issue. It has probative force in itself, and is conclusive unless overcome by the testimony of two witnesses, or one witness and corroborating circumstances. This rule, coming from the doctrines of the civil law, is firmly established in chancery practice.[1]

But this rule ceases where the reason for it no longer exists, and hence even an answer under oath, professing not to be on personal knowledge, has no probative force, and merely puts the matter in issue.[2]

There is nothing in the new rules indicating any intention to abrogate the pre-existing law as to the probative force of a sworn answer, unless it might be inferred from the allowance of inconsistent defenses (which would be a right hard answer to swear to); but this is hardly enough

[1] LATTA v. KILBOURN, 150 U. S. 524, 14 Sup. Ct. 201, 37 L. Ed. 1169; Kennedy v. Custer, 174 Fed. 972, 98 C. C. A. 584. *See "Equity," Dec. Dig. (Key-No.) § 345; Cent. Dig. §§ 715–724.*

[2] Hanchett v. Blair, 100 Fed. 817, 41 C. C. A. 76; Savings & Loan Soc. v. Davidson, 97 Fed. 696, 38 C. C. A. 365. *See "Equity," Dec. Dig. (Key-No.) § 341; Cent. Dig. § 687.*

to warrant an intent to change a rule of such long standing, and hence it is believed that this is still the law.

Prior to the new rules, statements in the bill neither admitted nor denied by the answer were not considered as impliedly admitted but had to be proved.[3]

But rule 30, above quoted, changes this, except as to averments of value or amount of damage.

Another material change made by new rule 30 is the allowance of inconsistent defenses in the answer. Heretofore it was not allowed.[4]

Under rule 43, want of parties may be set up by answer.

An important effect of rule 30 is the allowance of many defenses or counterclaims to be set up by answer which heretofore could be asserted only by cross-bill.[5]

SAME—SAME—JOINDER OF ISSUE ON

163. The joinder of issue on an answer is made
(a) In some cases by motion to strike out.
(b) In others by reply.
Usually no formal reply is necessary.

Under the former practice the method of questioning the sufficiency of an answer, whether in point of law or in respect of its being a full answer to the charges of the bill, was by exception. But new rule 33 provides:

"Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, set-off or

[3] Lovell v. Johnson (C. C.) 82 Fed. 206; Butterfield v. Miller, 195 Fed. 200, 208, 115 C. C. A. 152. *See "Equity," Dec. Dig. (Key-No.) § 325; Cent. Dig. §§ 641–647.*

[4] Ozark Land Co. v. Leonard (C. C.) 24 Fed. 660; Von Schroder v. Brittan (C. C.) 98 Fed. 169. *See "Equity," Dec. Dig. (Key-No.) § 184; Cent. Dig. § 425.*

[5] Mitchell v. International Tailoring Co. (C. C.) 169 Fed. 145. *See "Equity," Dec. Dig. (Key-No.) § 196; Cent. Dig. §§ 450–454.*

counterclaim, the plaintiff may, upon five days' notice, or such further time as the court may allow, test the sufficiency of the same by motion to strike out. If found insufficient but amendable the court may allow an amendment upon terms, or strike out the matter."

The language of this rule makes it manifest that a motion to strike out will lie only to new or affirmative matter in the answer, and not for its failure to fully answer the bill or to set up a sufficient defense of a merely negative nature.

If defendant fails to answer fully, plaintiff under new rule 30 can treat this as an admission of the truth of the unanswered part. If he wishes a discovery he can propound interrogatories and compel a reply under the provisions of new rule 58.

If on the other hand the answer fails to set up a good defense in law, the plaintiff is not hurt, but can contend for his relief with the greater confidence. So the abolition of the old practice of exceptions does no harm.

If the answer was not subject to exception for insufficiency, the method of putting in issue the facts set up in it was under the former practice by replication. Now new rule 31 provides:

"Unless the answer assert a set-off or counterclaim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff. If the answer include a set-off or counterclaim, the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counterclaim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply. In default of

a reply, a decree pro confesso on the counterclaim r be entered as in default of an answer to the bill."

Hearing on Bill and Answer

Another step, which practically amounts to joining sue on the answer, is by going to trial on bill and ansv This is tantamount to the position that the answer is so sufficient as not to amount to a legal defense—in ot words to a demurrer to the answer.[6]

But when this step is taken, the sufficiency of all facts well pleaded in the answer, whether they consis mere denials of the bill, or of defenses of new matter admitted; and the plaintiff, by resorting to it, runs risk of making his case rest upon the position that h entitled to a decree upon bill and answer; and, if he sho turn out to be mistaken, he has no further right to in upon joining issue and taking proofs.

Amendments of Answers.

Under the former practice, amendments of answers w allowed witn reluctance. This was the old doctrine of English chancery courts, and was emphasized by old equ rule 60. But the new rules are more liberal in this resp New rule 19 allows the amendment of any pleading in therance of justice, and new rule 30 makes special pro sion for the amendment of answers.

THE PROOFS

164. The evidence in equity cases is taken in open cour a rule, the other methods being the exception requiring a special showing to authorize their

By section 862 of the Revised Statutes[7] it is provi that "the mode of proof in causes of equity and of admi

[6] Banks v. Manchester, 128 U. S. 244, 9 Sup. Ct. 36, 32 L. Ed. *See "Equity," Dec. Dig. (Key-No.) § 213; Cent. Dig. § 486.*

[7] U. S. Comp. St. 1901, p. 661.

ty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided."

The special provisions alluded to are those authorizing the taking of depositions. Subject to these provisions, the equity rules make elaborate provision for the taking of testimony. They are contained in rules 46 to 56, inclusive.

The policy of these rules is a complete reversal of the former policy on the subject. The previous practice contemplated depositions as the rule. Under new rule 46 the evidence is taken in open court, except as otherwise provided. The court rules upon the admissibility of evidence at the time, allowing a party whose evidence is excluded to embody in the record what he expects to prove, and to except. Under rule 48, arrangements may be made for taking the testimony down in shorthand, and having the stenographer's fees taxed as costs.

SAME—TESTIMONY BY DEPOSITION BEFORE EXAMINERS

165. In exceptional cases the evidence may be taken by deposition before an examiner appointed by the court.

Equity rule 47 provides that when allowed by statute, or in exceptional cases to be shown by affidavit, the court may permit the deposition of named witnesses to be taken before an examiner or other named officer. The depositions of the plaintiff must be taken within sixty days after the cause is at issue, those of the defendant within sixty days after the expiration of the plaintiff's time, and the rebutting evidence within twenty days after the expiration of the defendant's time. Rule 49 provides that they shall be taken on question and answer or in narrative form, thus doing away with the old practice of written interrogatories in

such cases. Under rule 51, provision is made for noting ceptions to evidence, and for having it written down signed. Rule 52 provides for compelling the attendanc witnesses when in reach of a subpœna. And rule 53 vides for notice to the adverse party.

SAME—TESTIMONY BY DEPOSITION UNDE STATUTES

166. Testimony may also be taken by deposition in cases provided by statute.

Rule 54 provides as follows:

"After a cause is at issue, depositions may be taker provided by sections 863, 865, 866 and 867, Revised S utes. But if in any case no notice has been given the posite party of the time and place of taking the deposit he shall, upon application and notice, be entitled to h the witness examined orally before the court, or to a cr examination before an examiner or like officer, or a deposition taken with notice, as the court or judge der all the circumstances shall order."

In addition to the methods prescribed by these sectio such depositions may be taken in the mode prescribed the laws of the state where the court is held.[8]

It will be observed that rule 54 allows depositions un these statutes only "after a cause is at issue." But sect 863 allows such depositions "in any civil cause depend in a circuit or district court * * * when the witn lives at a greater distance from the place of trial than

[8] Act March 9, 1892, c. 14, 27 Stat. 7 (U. S. Comp. St. 1901, p. 6 But this act only adopts the state method of taking depositio it does not enlarge the conditions under which they may be ta beyond those named in the federal statutes. Hanks Dental A v. International Tooth Crown Co., 194 U. S. 303, 24 Sup. Ct. 700 L. Ed. 989. *See "Courts," Dec. Dig. (Key-No.) § 350; Cent. Di 923.*

hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm."

This language is wide enough to allow depositions before a case is at issue, and that must have been its intent. Otherwise valuable testimony would be inevitably lost while waiting for the case to be at issue. Even under new rule 12, which has greatly shortened the time formerly allowed defendant, process is not returnable until twenty days after issue, and the defendant need not defend till twenty days after service. Hence, if process is served on the last day, thirty-nine days might elapse before issue. If the defendant then moves to dismiss instead of answering and raises a delicate jurisdictional question which the court takes under advisement, there is no telling how long a time may elapse before issue.

Even the Supreme Court cannot repeal a statute by a rule. Section 862 conferring the power to regulate the mode of proof in equity and admiralty cases expressly excepts cases "herein specially provided." Section 917 giving a similar power to make rules limits it to cases "not inconsistent with any law of the United States." This preserves the right given by section 863, which contains no language limiting the right to cases at issue, and which has been construed not to mean that; and hence it is believed that notwithstanding this limitation in the rule, depositions can be taken in the urgent cases named in section 863, although the case is not at issue.[9]

[9] In Flower v. MacGinniss, 112 Fed. 377, 50 C. C. A. 291, it was held that depositions may be taken in admiralty before issue joined. In Stegner v. Blake (C. C.) 36 Fed. 183, the statute was held to apply to the equity court. On the other hand, Flower v. MacGinniss, supra, and Stevens v. Missouri, K. & T. R. Co. (C. C.) 104 Fed. 934, held that depositions could not be taken until after issue in an equity case. The ruling was based on the language of old rule 68.

Under rule 56, the case goes on the trial calendar after the lapse of the time allowed for depositions, and it takes a strong showing thereafter to allow the taking of any more depositions.

REFERENCES

167. It is common in chancery cases to have references of various matters to special masters or commissioners. This, however, is not a matter of right, and under the new rules is only made on showing an exceptional condition requiring it.

When special questions are referred to a master, his report is entitled to great weight, because of his superior facilities for investigation; but his findings are not conclusive, and may be set aside by the court.

Exceptions to a master's report must be filed twenty days from the filing of the report, or may be taken at the time the same is read to the parties by the master.

Exceptions are not necessary for the purpose of raising questions of law appearing on the face of the report.

On consent of parties, the court may refer to a master the entire question, both of law and fact, in the case. When this is done, the decision of the mas-

which was in this respect the same as new rule 54. Neither case considered the question of the right of the court to make a rule in conflict with the statute as guarded by the limitations above quoted on the power of the court. The first case expressly held that a case in equity is "depending" as soon as the bill is filed. The statute itself draws no distinction between equity and admiralty cases, and the preservation of testimony may be just as important in one as in the other. The author believes, in spite of these decisions and the language of the rule, that depositions taken under section 863 (U. S. Comp. St. 1901, p. 661) in an equity case before issue ought to be admitted. *See "Admiralty," Dec. Dig. (Key-No.) § 76; Cent. Dig. §§ 588–591; "Courts," Dec. Dig. (Key-No.) § 350; Cent. Dig. § 923.*

ter is presumptively correct, and can be overruled only when there has been manifest error in the consideration given to the evidence, or in the application of the law.

The matter of references is covered by new rules 59 to 68, inclusive.

A reference is not a matter of right, and is not allowed unless the plaintiff shows a prima facie case; nor is it allowed for the mere purpose of aiding him to make out his case.[10]

Under new rule 65, a reference, save in matters of account, is the exception, not the rule, and is made only on showing that some exceptional condition requires it.

Nor is the court bound to refer any questions, but it may, if it sees fit, go into questions of account itself, or have the accounts made up at the bar of the court.[11]

The appointment of masters in chancery is provided by rule 68, which allows district courts to appoint standing masters in chancery in their respective districts, or to appoint a master pro hac vice in any particular case. Their duties are defined by Justice Field in Kimberly v. Arms.[12]

Under section 68 of the Judicial Code, clerks or their deputies should not be appointed special masters unless the court certifies in the order that there is a good reason for such appointment in the special case. If, however, they are appointed, such appointment cannot be questioned collaterally, and their acts are valid.[13]

[10] Columbian Equipment Co. v. Mercantile Trust & Deposit Co., 113 Fed. 23, 51 C. C. A. 33. *See "Equity," Dec. Dig. (Key-No.)* §§ 399, 400; *Cent. Dig.* §§ 864–868.

[11] Brown v. Grove, 80 Fed. 564, 25 C. C. A. 644. *See "Equity," Dec. Dig. (Key-No.)* §§ *399, 400; Cent. Dig.* §§ *864–868.*

[12] 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764. *See "Equity," Dec. Dig. (Key-No.)* § *395; Cent. Dig.* §§ *854–856, 920, 921.*

[13] Seaman v. Northwestern Mutual Life Insurance Co., 86 Fed. 500, 30 C. C. A. 212. As to the effect of disregarding the statute,

There are no special statutes regulating the amount of compensation of such masters, but that is a question of discretion in the court.[14]

The practice of referring the whole case to a master has been frequently disapproved, for only separate questions should be referred to him.

If an order is entered by consent of both parties referring to him all questions in the case, it comes very near an arbitration, and his findings in such case are difficult to question. On this subject Mr. Justice Field says in Kimberly v. Arms:[15]

"A master in chancery is an officer appointed by the court to assist it in various proceedings incidental to the progress of a cause before it, and is usually employed to take and state accounts, to take and report testimony, and to perform such duties as require computation of interest, the value of annuities, the amount of damages in particular cases, the auditing and ascertaining of liens upon property involved, and similar services. The information which he may communicate by his findings in such cases, upon the evidence presented to him, is merely advisory to the court, which it may accept and act upon or disregard, in whole or in part, according to its own judgment as to the weight of the evidence. * * *

"It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him without the consent of the parties. It cannot, of its own

see Briggs v. Neal, 120 Fed. 224, 56 C. C. A. 572; Quinton v. Neville, 154 Fed. 432, 83 C. C. A. 252. *See "Equity," Dec. Dig. (Key-No.) § 393; Cent. Dig. §§ 852, 853.*

[14] Finance Committee of Pennsylvania v. Warren, 82 Fed. 525, 27 C. C. A. 472. *See "Equity," Dec. Dig. (Key-No.) § 394; Cent. Dig. §§ 857–859.*

[15] 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764. See, also, Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; Jefferson Hotel Co. v. Brumbaugh, 168 Fed. 867, 94 C. C. A. 279. *See "Equity," Dec. Dig. (Key-No.) § 409; Cent. Dig. §§ 904, 920–923.*

motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers. But when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law, and such reference is entered as a rule of the court, the master is clothed with very different powers from those which he exercises upon ordinary references, without such consent, and his determinations are not subject to be set aside and disregarded at the mere discretion of the court. A reference, by consent of parties, of an entire case, for the determination of all its issues, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rules—is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively correct—subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise."

But where the master is appointed otherwise than by consent, and only special questions are referred to him, his findings, while strong, are not conclusive. There is always a presumption in favor of such findings, as he has had the opportunity of seeing the witnesses themselves, and has other facilities for judging of the value of their testimony which are not available to the court. But in such case they can be questioned with some show of success.[16]

[16] Bosworth v. Hook, 77 Fed. 686, 23 C. C. A. 404; Girard Life Ins., Annuity & Trust Co. v. Cooper, 162 U. S. 529, 16 Sup. Ct. 879, 40 L. Ed. 1062; Blassengame v. Boyd, 178 Fed. 1, 101 C. C. A. 129, 21 Ann. Cas. 800. *See "Equity," Dec. Dig. (Key-No.) § 409; Cent. Dig. §§ 904, 920–923.*

A master, in exercising a reference, may take testimony outside of the district.[17]

When the master's report is completed and filed in the clerk's office, the parties have twenty days therefrom for the purpose of filing exceptions.[18]

Great care is requisite in the preparation of these exceptions. Exceptions to questions of fact cannot be taken at all unless the evidence is sent up with the report.[19]

Nor can they be first taken in the appellate court.[20]

They must be specific, must raise clearly defined issues, and, when to questions of fact, they should refer to the part of the testimony relied on to set the finding aside.[21]

The proper practice in reference to the preparation of exceptions is for the master, when he has completed his draft of report, and before he files it, to notify the different parties interested to appear before him, and then to submit it to them. When they so appear, they should point out to him the parts in it in which they think he is in error, so as to give him the opportunity of correcting it if he sees fit; and he should embody in his report a statement that the parties had excepted to certain parts. This procedure is rendered necessary by the line of decisions which hold that matters not brought to the attention of the master cannot be made the subject of exception.[22]

[17] Consolidated Fastener Co. v. Columbian Fastener Co. (C. C.) 85 Fed. 54. *See "Equity," Dec. Dig. (Key-No.) § 395; Cent. Dig. § 854.*

[18] Rule 66. *See "Equity," Dec. Dig. (Key-No.) § 410; Cent. Dig. §§ 905–919.*

[19] SHEFFIELD & B. COAL, IRON & R. CO. v. GORDON, 151 U. S. 285, 14 Sup. Ct. 343, 38 L. Ed. 164. *See "Equity," Dec. Dig. (Key-No.) § 410; Cent. Dig. §§ 905–919.*

[20] Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658. *See "Appeal and Error," Dec. Dig. (Key-No.) § 266; Cent. Dig. §§ 1552–1571.*

[21] SHEFFIELD & B. COAL, IRON & R. CO. v. GORDON, 151 U. S. 285, 14 Sup. Ct. 343, 38 L. Ed. 164; Stanton v. Alabama & C. Railroad Co., Fed. Cas. No. 13,296; Farrar v. Bernheim, 75 Fed. 136, 21 C. C. A. 264. *See "Equity," Dec. Dig. (Key-No.) § 410; Cent. Dig. §§ 905–919.*

[22] Columbus S. & H. R. Co.'s Appeal, 109 Fed. 177, 48 C. C. A.

If the master should disregard this practice, and file his report without giving the parties an opportunity, it would seem pretty clear, under the language of the sixty-sixth rule, that they could then file their exceptions anyhow.

Exceptions are not necessary for the purpose of raising questions of law appearing on the face of the report.[23]

The reports which can be excepted to within twenty days are those reports referred to the master in which he acts in a semijudicial capacity, but the rule does not apply to the right of a special master appointed to conduct sales of property.[24]

An exception should not be used as a means of setting up a new defense in the case which has not already appeared in the pleadings.[25]

The master, in the exercise of a sound discretion, may permit new evidence after he has submitted the draft of report to the parties, if he thinks the equities of the case call for it.[26]

But after the report has been drafted it is not permissible for a petitioner to come in and amend his petition so as to set up a new ground of recovery thereon.[27]

276; McMicken v. Perin, 18 How. 507, 15 L. Ed. 504; Gay Mfg. Co. v. Camp, 68 Fed. 67, 15 C. C. A. 226. *See "Equity," Dec. Dig. (Key-No.) § 410; Cent. Dig. §§ 905–919.*

[23] Home Land & Cattle Co. v. McNamara, 111 Fed. 822, 49 C. C. A. 642; Burke v. Davis, 81 Fed. 907, 26 C. C. A. 675; Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C. C.) 40 Fed. 476. *See "Equity," Dec. Dig. (Key-No.) § 410; Cent. Dig. §§ 905–919.*

[24] Pewabic Min. Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732. *See "Equity," Dec. Dig. (Key-No.) § 410; Cent. Dig. §§ 905–919.*

[25] City of New Orleans v. Warner, 180 U. S. 199, 21 Sup. Ct. 353, 45 L. Ed. 493. *See "Equity," Dec. Dig. (Key-No.) § 410; Cent. Dig. §§ 905–919.*

[26] Central Trust Co. v. Richmond & D. R. Co. (C. C.) 69 Fed. 761. *See "Equity," Dec. Dig. (Key-No.) § 405; Cent. Dig. §§ 880–885, 892.*

[27] Central Trust Co. v. Marietta & N. G. Ry. Co. (C. C.) 75 Fed. 41. *See "Equity," Dec. Dig. (Key-No.) § 405; Cent. Dig. §§ 880–885, 892.*

THE DECREE—FORM OF

168. In the federal practice, it is not necessary, in preparing the decree, to "bring the case on," as it is technically called, by reciting all the previous proceedings in the case.

A decree may simply commence as follows: "This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was adjudged, ordered, and decreed as follows," etc.[28]

SAME—ITS ENFORCEMENT

169. Equity decrees are enforceable:

(a) Against the property of the parties:

(1) By writ of execution if the decree is for money;

(2) By a sale of the property under a master commissioner in other cases.

(b) Against the parties themselves when the purpose of the suit is to compel some specific act by them.

An equity decree may, under some circumstances, be enforced against the property of the parties, and, under others, against the parties themselves, and it must be considered under these two divisions.

(*a*) *Against Property of Parties*

Final process to execute a decree, if it is for money, is by writ of execution in the form used in the district court in actions of assumpsit.[29]

If the decree is not simply for money, but contemplates the sale of property under control of the court, its method of enforcement is the appointment of a standing or special master to conduct the sale. It is usual to require a bond

[28] Rule 71. [29] Rule 8.

of such an officer, but is not necessary, for frequently the provisions of the decree are such that the master does not handle the money, which is paid into court or otherwise provided for.[30]

By Sale

The act of March 3, 1893,[31] makes important provisions as to sales of property in the federal courts. It is as follows:

"Be it enacted," etc., "that all real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the courthouse of the county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct.

"Sec. 2. That all personal property sold under any order or decree of any court of the United States shall be sold as provided in the first section of this act, unless, in the opinion of the court rendering such order or decree, it would be best to sell it in some other manner.

"Sec. 3. That hereafter no sale of real estate under any order, judgment, or decree of any United States court shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale in at least one newspaper printed, regularly issued and having a general circulation in the county and state where the real estate proposed to be sold is situated, if such there be. If said property shall be situated in more than one county or state, such notice shall be published in such of the counties where said property is situated, as the court may direct. Said notice shall, among other things, describe the real estate to be sold. The court may, in its discretion, direct the publication of

[30] Seaman v. Northwestern Mutual Life Ins. Co., 86 Fed. 493, 30 C. C. A. 212. *See "Equity," Dec. Dig. (Key-No.) § 438; Cent. Dig. § 1055.*

[31] 27 Stat. 751, c. 225 (U. S. Comp. St. 1901, p. 710).

the notice of sale herein provided for to be made in such other papers as may seem proper."

This statute has been construed to be intended as a safeguard for the protection of the defendant, from which it follows that its provisions may be waived by him either expressly or impliedly. Hence when a sale was conducted not in strict accordance with its terms, but was confirmed after notice to the defendant, and no objection by him, it was held to be valid.[32]

Sales of Real Estate

On the other hand, as to sales of real estate, it has been held to be mandatory, and to render a sale otherwise than at auction absolutely void and liable to repudiation by a purchaser even after confirmation.[33]

It does not apply to sales of real estate in bankruptcy.[34]

In conducting a judicial sale, the bid of an intending purchaser is a mere offer, and the court may accept it or not, as it sees fit.[35]

A bidder at the judicial sale so far becomes a party to the cause that the court may proceed against him by rule to compel his compliance with his contract, and it is not necessary to bring a separate suit against him for the price.[36]

It follows from the above that, as a bid is a mere offer,

[32] Nevada Nickel Syndicate v. Nickel Co. (C. C.) 103 Fed. 391; National Nickel Co. v. National Nickel Syndicate (C. C.) 106 Fed. 111; Godchaux v. Morris, 121 Fed. 482, 57 C. C. A. 434. *See "Judicial Sales," Dec. Dig. (Key-No.) § 11; Cent. Dig. §§ 25–30.*

[33] Cumberland Lumber Co. v. Tunis Lumber Co., 171 Fed. 352, 96 C. C. A. 244. *See "Courts," Dec. Dig. (Key-No.) § 355; Cent. Dig. §§ 935, 936.*

[34] In re Britannia Mining Co. (C. C. A.) 203 Fed. 450, reversing 197 Fed. 459; In re National Mining Exploration Co. (D. C.) 193 Fed. 232. These may be private. Ante, p. 162. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 261, 262.*

[35] Camden v. Mayhew, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. Ed. 608; State of Tennessee v. Quintard, 80 Fed. 829, 26 C. C. A. 165. *See "Judicial Sales," Dec. Dig. (Key-No.) § 20; Cent. Dig. § 44.*

[36] Stuart v. Gay, 127 U. S. 518, 8 Sup. Ct. 1279, 32 L. Ed. 191; Camden v. Mayhew, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. Ed. 608. *See "Judicial Sales," Dec. Dig. (Key-No.) § 28; Cent. Dig. § 55.*

the court may set the sale aside. But while it has this power, it is reluctant to use it, for few parties would attend judicial sales unless they have some assurance that the sale will be a finality. Hence mere inadequacy of price is not sufficient to set a sale aside, unless it is so great as to shock the conscience; but it may result in the court looking into the facts more closely, and finding other grounds for refusing to confirm the sale.[37]

(b) Enforcement against the Parties Themselves

Equity decrees are not only for the sale of property, but frequently for the purpose of compelling some specific act by the parties themselves. Hence, in enforcing such orders, equity must have some power to proceed against the parties personally. This is provided by equity rule 8.

It may Order Conveyances by the Party, or the Delivery up of Deeds or Other Documents

Where a part of the property is within the jurisdiction of the court, it may transfer the title not only to the part within its jurisdiction, but also to that part without it, by ordering a master to make a deed to the property or by compelling the parties before the court to make the proper conveyances.[38]

In this respect the federal courts have such an advantage over the local tribunals that the large railway foreclosures generally find their way into the former courts. By means of their jurisdiction over the parties, ancillary bills and

[37] SCHROEDER v. YOUNG, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. Ed. 721; Magann v. Segal, 92 Fed. 252, 34 C. C. A. 323. *See "Judicial Sales," Dec. Dig. (Key-No.) §§ 39, 40; Cent. Dig. §§ 77, 78.*

[38] MULLER v. DOWS, 94 U. S. 444, 24 L. Ed. 207; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C.) 29 Fed. 618; Boston Safe Deposit & Trust Co. v. Bankers' & Merchants' Telegraph Co. (C. C.) 36 Fed. 289; Woodbury v. Allegheny & K. R. Co. (C. C.) 72 Fed. 371. Compare Fall v. Eastin, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853; Jones v. Byrne (C. C.) 149 Fed. 457. *See "Courts," Dec. Dig. (Key-No.) § 263; Cent. Dig. § 799; "Judgment," Dec. Dig. (Key-No.) § 818.*

the extra territorial powers of receivers under section 56 of the Judicial Code, they can act more promptly, and within territory unknown to the local tribunals.

Compelling Obedience to Order

The federal courts will not only order conveyances, but they have summary means of compelling obedience to their orders. Under rule 8, if the defendant can be found, a writ of attachment will be issued against him, under which he will be held until he complies with the requirements of the court. If he cannot be found, a writ of sequestration may issue against his property, as a means of compelling obedience. And under the provisions of rule 9 a writ of assistance will lie to compel the delivery of possession. This writ is a proper means of putting a purchaser at a mortgage or other foreclosure sale in possession of the property purchased.[39]

An ancillary bill may also be used for this purpose where a writ of assistance is unavailing.[40]

Under rule 8, if the orders of the court are not complied with, it may appoint some other person to perform the act for and at the cost of the disobedient party.

A court will also by its process compel restitution of property to the proper party. For instance, where a lower court decided in favor of one party, and the case was afterwards reversed, it was held that the lower court could compel the party who had meanwhile collected the money to pay it back, although the ground of reversal was lack of jurisdiction in the lower court, for it retained at least enough jurisdiction to undo the wrong that it had done.[41]

[39] Terrell v. Allison, 21 Wall. 289, 22 L. Ed. 634. *See "Equity," Dec. Dig. (Key-No.) § 439; Cent. Dig. § 1056.*

[40] ROOT v. WOOLWORTH, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. Ed. 1123; Alton Water Co. v. Brown, 166 Fed. 840, 92 C. C. A. 598. *See "Equity," Dec. Dig. (Key-No.) § 437; Cent. Dig. §§ 1053, 1054.*

[41] Northwestern Fuel Co. v. Brock, 139 U. S. 216, 11 Sup. Ct. 523, 35 L. Ed. 151. *See "Appeal and Error," Dec. Dig. (Key-No.) § 1208;*

SAME—REOPENING OF DECREE

170. Decrees may be reopened on motion, by petition for rehearing, and by bill of review, according to the nature of the grounds on which application is made.

Equity rule 72 permits the correction of clerical errors in decrees at any time before the close of the term at which final decree is rendered, when the matter is brought to the attention of the court by petition, and in such case a rehearing is not necessary.

Equity rule 69 provides for the case of special rehearings, and is as follows: "Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the circuit court of appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court." [42]

It is not sufficient merely to file a petition during the term named by the above rule. Some action upon the petition must be taken by the court in order to preserve the rights of the parties.[43]

Cent. Dig. §§ 4701–4709; "Equity," Dec. Dig. (Key-No.) § 426; Cent. Dig. §§ 999, 1000.

[42] MOELLE v. SHERWOOD, 148 U. S. 21, 13 Sup. Ct. 426, 37 L. Ed. 350. *See "Equity," Dec. Dig. (Key-No.) § 430; Cent. Dig. §§ 1034–1047.*

[43] Graham v. Swayne, 109 Fed. 366, 48 C. C. A. 411. *See "Equity," Dec. Dig. (Key-No.) § 430; Cent. Dig. §§ 1034–1047.*

Motion

Under some circumstances, decrees may be reopened on motion. For instance, if the judge has been deceived by counsel into entering an order which he did not intend to enter, it may be set aside on motion.[44]

This method may also be resorted to for the purpose of introducing new evidence where the circumstances of the case permit such introduction.[45]

But such motion will not be entertained after the close of the term.[46]

Bill of Review

A common method of avoiding the effect of final decrees is by bill of review. This method, however, only lies for substantial error of law apparent on the face of the record, or for new matter arising since the entry of the decree, or for newly discovered evidence which could not have been found and produced by the use of reasonable diligence before the entry of the decree.[47]

A bill of review for errors of law will not lie at any time after the period prescribed for an appeal, for the reason that there must be some finality to litigation, and the adop-

[44] U. S. v. Williams, 67 Fed. 384, 14 C. C. A. 440. *See "Equity," Dec. Dig. (Key-No.) § 430; Cent. Dig. §§ 1034–1047.*

[45] Campbell Printing-Press & Mfg. Co. v. Marden (C. C.) 70 Fed. 339. The court may do this during the term though an appeal has been taken, and may request the return of the record from the appellate court for the purpose. Nutter v. Mossberg (C. C.) 118 Fed. 168. *See "Equity," Dec. Dig. (Key-No.) § 430; Cent. Dig. §§ 1034–1047.*

[46] McGregor v. Vermont Loan & Trust Co., 104 Fed. 709, 44 C. C. A. 146. *See "Equity," Dec. Dig. (Key-No.) § 430; Cent. Dig. §§ 1034–1047.*

[47] Hill v. Phelps, 101 Fed. 650, 41 C. C. A. 56; Acord v. Western Pocahontas Corporation (C. C.) 156 Fed. 989; Id., 174 Fed. 1019, 98 C. C. A. 625; Taylor v. Easton, 180 Fed. 363, 103 C. C. A. 509. *See "Equity," Dec. Dig. (Key-No.) §§ 442, 445, 452; Cent. Dig. §§ 1065–1070, 1078–1094.*

tion of the statutory limitations in regard to appeals furnishes a good point at which to draw the line.[48]

The above rules in relation to reopening decrees relate, of course, to final decrees. Interlocutory decrees are always considered in the breast of the court.

[48] Blythe Co. v. Hinckley, 111 Fed. 827, 49 C. C. A. 647; Home St. Ry. Co. v. Lincoln, 162 Fed. 133, 89 C. C. A. 133. *See "Equity," Dec. Dig. (Key-No.) § 452; Cent. Dig. §§ 1101–1109.*

CHAPTER XXI

APPELLATE JURISDICTION—THE CIRCUIT COURT OF APPEALS.

171. The Appellate Courts.
172. The Circuit Court of Appeals—Its Organization.
173. Jurisdiction of the Circuit Court of Appeals.
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177. Same—Power of Circuit Court of Appeals to Issue Auxiliary Writs.

THE APPELLATE COURTS

171. The federal appellate jurisdiction is vested in the Supreme Court of the United States and the circuit courts of appeals for the various circuits, and is divided between the latter class and the Supreme Court in accordance with regulations fixed by law.

The Appellate Jurisdiction and Its Distribution among the Appellate Courts

(1) *Original Organization*

Until 1891 the appellate jurisdiction of the federal courts—leaving out of view the courts of local interest, like those of the District of Columbia—was vested in the circuit court and in the Supreme Court. The appellate jurisdiction of the former was restricted to a few special classes of cases, while that of the latter constituted the great mass of litigation that found its way into the federal courts. This system worked satisfactorily until the beginning of the Civil War. Up to that time a small limit as to amount was all that was necessary to enable the Supreme Court to

handle the appellate business which had been entrusted to it. There were many cases, however, as to which there was no appeal at all—some of them of great importance, like criminal cases.

The growth of the country, and especially the increasing importance of the federal courts due to the new questions springing out of the Civil War, brought to pass at its close that the Supreme Court could not attend to the appellate jurisdiction which had been conferred upon it. Long delays became inevitable, with their attendant inconvenience to the litigants. This was the subject of much discussion, and many plans of relief, but nothing definite was accomplished until 1875, when an attempt was made to relieve the Supreme Court by raising the limit necessary in appeals to five thousand dollars, instead of two thousand, as had been the previous amount. This temporary expedient, however, failed of its purpose, for not only had the volume of litigation immensely increased, but its character. The result was that the Supreme Court, in spite of its struggles against the ever accumulating mass of appeals, found itself hopelessly in arrears, so that it required from three to five years to secure a hearing of an appeal. This was offering a premium to delays, and put it in the power of litigants to force disadvantageous compromises on the successful party, or keep him out of the fruits of his litigation, even in cases where the appeal had no merit. The discussion of the proper measure of relief continued, but resulted in nothing tangible until 1891.

(2) *Present Organization*

By the act of March 3, 1891,[1] the whole system of appeals was remodeled, the jurisdiction formerly vested in the appellate courts redistributed, and appeals given in classes where no appeal had been available. The object of the act is expressed in American Const. Co. v. Jacksonville,

[1] 26 Stat. 826, c. 517 (U. S. Comp. St. 1901, p. 547).

T. & K. W. Ry. Co.[2] In it the Supreme Court said: "The primary object of this act, well known as a matter of public history, manifest on the face of the act, and judicially declared in the leading cases under it, was to relieve this court of the overburden of cases and of controversies, arising from the rapid growth of the country, and the steady increase of litigation; and, for the accomplishment of this object, to transfer a large part of its appellate jurisdiction to the circuit courts of appeals thereby established in each judicial circuit, and to distribute between this court and those, according to the scheme of the act, the entire appellate jurisdiction from the circuit and district courts of the United States. * * * The act has uniformly been so construed and applied by this court as to promote its general purpose of lessening the burden of litigation in this court, transferring the appellate jurisdiction in large classes of cases to the circuit court of appeals, and making the judgments of that court final, except in extraordinary cases."

The scheme of this act was to establish in each judicial circuit a local appellate court, to be called the United States circuit court of appeals of that circuit, and to distribute the appellate jurisdiction between these local courts and the Supreme Court; conferring upon the former the great mass of ordinary litigation, and reserving for the latter questions of general or national interest, with certain provisions intended to prevent divergence of decisions in the different circuits.

The act with some changes since its passage, now constitutes the sixth chapter of the Judicial Code, covering sections 116–135, inclusive.

[2] 148 U. S. 372, 382, 13 Sup. Ct. 758, 37 L. Ed. 486. *See "Courts," Dec. Dig. (Key-No.) § 401; Cent. Dig. § 1094.*

THE CIRCUIT COURT OF APPEALS—ITS ORGANIZATION

172. Each judicial circuit has an appellate court called the Circuit Court of Appeals. The judges who may hold this court are the Supreme Court justice for the particular circuit, the circuit judges for the circuit (and certain others by special assignment), and the district judges for the circuit when the circuit justice or circuit judges cannot sit; any two of these judges constituting a quorum. But no judge who sat on the trial court for the original trial of a cause or question can sit on the appellate court for the trial of the appeal in that cause or question.

Prior to this act, the judges competent to hold the circuit courts, in addition to the district judges, were the Supreme Court justice assigned to that special circuit, and the circuit judge for that circuit. The act added a new circuit judge to each circuit, on the idea that the court was, in the first instance, to be composed of the circuit justice for that circuit and the two circuit judges of the circuit; but as it was realized that the attendance of the circuit justices would necessarily be uncertain, and, further, that the circuit judges would be frequently disqualified by reason of having sat in the circuit court, it was also provided that the district judges comprised within that circuit should be competent to sit upon this local appellate court. Two judges, however, constituted a quorum. Thus the court is a very changeable one—a fact which has not been to its advantage, as unity of practice and decision is much harder with a changing court than with one composed all the time of the same members.

Section 118 of the Judicial Code increased the number of circuit judges, except in the fourth circuit. And the five

new circuit judges appointed for the commerce court may also be assigned to the circuit courts of appeals under section 201 of the Judicial Code.

The district judges are only called to sit, under the provisions of the third section of the act, when the associate justice and the circuit judges are not all present, and the district judges in such case may be called either by general or particular assignment. The third section, however, provides that no justice or judge before whom a cause or question may have been tried or heard in a district court or existing circuit court shall sit on the trial or hearing of such cause or question in the circuit court of appeals.

In Moran v. Dillingham [8] the Supreme Court strongly intimates that under this provision a judge who has sat in the case is disqualified in the appellate court from hearing the case or any part of it; and, as the object of the act is to furnish an appellate court of judges absolutely uncommitted, this would certainly seem to be its natural construction. And it holds that a judge who has heard the case on its merits cannot sit in the appellate court on any question involved in it, and that a judge who has heard any single question in the case cannot sit in the appellate court on the hearing of that question, or any other question immediately dependent upon it, if the effect of such appeal may be that the case will be reversed, regardless of the merits of the decision.

[8] 174 U. S. 153, 157, 19 Sup. Ct. 620, 43 L. Ed. 930. See, also, Rexford v. Brunswick-Balke-Collender Co., 228 U. S. 339, 33 Sup. Ct. 515, 57 L. Ed. ——; William Cramp & Sons Ship & Engine Bldg. Co. v. International Curtiss Marine Turbine Co., 228 U. S. 645, 33 Sup. Ct. 722, 57 L. Ed. ——. *See "Judges," Dec. Dig. (Key-No.) § 48; Cent. Dig. §§ 220, 221.*

JURISDICTION OF THE CIRCUIT COURT OF APPEALS

173. All final decisions of the district courts, except those special jurisdictional, international, and constitutional questions intrusted to the Supreme Court, are reviewable in the circuit court of appeals.

The main jurisdiction of the court is defined by section 128 of the Judicial Code as follows:

"The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

Sections 239 and 240, alluded to above, were part of the original act of 1891, but have been carried into the chapter of the Judicial Code devoted to the Supreme Court. As they are necessary to understand the subject, they are set out in full, as follows:

"Sec. 239. In any case within its appellate jurisdiction, as defined in section one hundred and twenty-eight, the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that

court for its proper decision; and thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

"Sec. 240. In any case, civil or criminal, in which the judgment or decree of the circuit court of appeals is made final by the provisions of this title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

No Monetary Amount

As to the limits of this jurisdiction, it should be observed in the first place that there is no limit as to amount. The Paquete Habana,[4] which reviews the earlier statutes as to the amount required for jurisdiction, so holds. The reason is obvious. Under the present federal legislation nearly all the litigation in the district court has a limitation of $3,000, applicable to the court of first instance, and that is sufficiently high for purposes of an appeal. Cases involving less than that amount are self-corrective, as appeals are not often taken by litigants, on account of the expense, where the amount involved is small.

Subject-Matter

Now, as to the subject-matter of the appellate jurisdiction, it covers the great mass of litigation; appeals to that court being the rule, and those to the Supreme Court being

[4] 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320. See, also, Kirby v. American Soda Fountain Co., 194 U. S. 141, 24 Sup. Ct. 619, 48 L. Ed. 911. *See "Courts," Dec. Dig. (Key-No.) § 405.*

the exception. The statute above quoted uses the language that the appeal shall exist "in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court as provided in section two hundred and thirty-eight, unless otherwise provided by law"; and it has been held that this latter clause was a saving clause intended to keep in force acts contemporaneous with this act or subsequent thereto, and not intended to apply to previous provisions as to appeals, as that construction would nullify the whole act.[5]

SAME—CASES EXCEPTED FROM THE JURISDICTION OF THE CIRCUIT COURT OF APPEALS

174. Jurisdictional, prize, and constitutional questions are intrusted to the Supreme Court, though the circuit courts of appeals may acquire cognizance of cases in these classes when questions included therein are connected in the case with other questions over which the latter court has jurisdiction.

The statute above quoted excludes from the jurisdiction of the circuit court of appeals those cases which may be taken direct to the Supreme Court under section 238 of the Judicial Code.

That section is as follows:

"Appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii, direct to the Supreme Court in the following cases:

(a) In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone

[5] Louisville Public Warehouse Co. v. Collector of Customs, 49 Fed. 561, 1 C. C. A. 371; The Paquete Habana, 175 U. S. 677, 683, 20 Sup. Ct. 290, 44 L. Ed. 320. *See "Courts," Dec. Dig. (Key-No.) § 405; Cent. Dig. §§ 1099–1102.*

shall be certified to the Supreme Court from the court below for decision.

(b) From the final sentences and decrees in prize causes.

(c) In any case that involves the construction or application of the Constitution of the United States.

(d) In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question.

(e) And in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

Thus sections 128 and 238 of the Judicial Code distribute the jurisdiction between the circuit courts of appeals and the Supreme Court on the general idea of conferring all the jurisdiction upon the circuit court of appeals, except jurisdictional, constitutional, or international questions.

Instances of Cases Cognizable by the Circuit Court of Appeals

Questions of jurisdiction of the trial court are taken to the Supreme Court by certificate. The question what constitutes jurisdiction is well expressed by Judge Brown in an admiralty case.[6] In it he said: "Jurisdiction is the power to adjudicate a case upon the merits, and dispose of it as justice may require. As applied to a suit in rem for the breach of a maritime contract, it presupposes, first, that the contract sued upon is a maritime contract; and, second, that the property proceeded against is within the lawful custody of the court. These are the only requirements necessary to give jurisdiction. Proper cognizance of the parties and subject-matter being conceded, all other matters belong to the merits."

[6] The Resolute, 168 U. S. 437, 18 Sup. Ct. 112, 42 L. Ed. 533. Whether the giving of a forthcoming bond in an attachment case waives a special appearance and puts defendant in court is a question of jurisdiction. Olds v. Herman H. Hettler Lumber Co., 195 Fed. 9, 115 C. C. A. 91. *See "Courts," Dec. Dig. (Key-No.) §§ 1–5; Cent. Dig. §§ 1–12.*

Accordingly he held that the question whether a seaman had a lien upon a vessel for wages accrued while a receiver was operating it, and whether he could assert such lien against the purchaser of the vessel after it had left the custody of the receiver, was not a question of jurisdiction. So, too, the question whether the defendant in an involuntary bankruptcy proceeding was engaged chiefly in farming is not a question of jurisdiction, but a defense going to the merits.[7] So, too, in a proceeding by contempt, the question whether the facts shown made out a case of contempt is a question that went to the merits, and not to the jurisdiction, for the court had admitted jurisdiction over the person and over the subject-matter of contempts.[8] And the jurisdiction alluded to in this act means the jurisdiction in the case from which the appeal is taken, not the jurisdiction in another case out of which this case grew.[9] So, too, "jurisdiction" is not synonymous with "authority." For instance, a receiver filed a petition for the settlement of his accounts, and the payment of certain costs and expenses, which petition was denied. The contention that the court had no authority to require him to pay these costs and expenses was held not to be a jurisdictional question.[10]

The jurisdiction referred to in this connection means the jurisdiction of the court as a federal court, not the general jurisdiction of the court as a court.[11] Hence, where the defense to a suit in equity is that the court had no jurisdiction

[7] Denver First Nat. Bank v. Klug, 186 U. S. 202, 22 Sup. Ct. 899, 46 L. Ed. 1127. *See "Courts," Dec. Dig. (Key-No.) §§ 1, 385, 405.*

[8] O'Neal v. U. S., 190 U. S. 36, 23 Sup. Ct. 776, 47 L. Ed. 945. *See "Courts," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–10.*

[9] Ex parte Lennon, 150 U. S. 393, 14 Sup. Ct. 123, 37 L. Ed. 1120. *See "Courts," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–10.*

[10] Chapman v. Atlantic Trust Co., 119 Fed. 257, 56 C. C. A. 61. *See "Courts," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–10.*

[11] U. S. v. Larkin, 208 U. S. 333, 28 Sup. Ct. 417, 52 L. Ed. 517; Fidelity Trust Co. v. Gaskell, 195 Fed. 865, 115 C. C. A. 527. *See "Appeal and Error," Dec. Dig. (Key-No.) § 17; Cent. Dig. § 61; "Courts," Dec. Dig. (Key-No.) § 405.*

because there was an adequate remedy at law, but there was no question of the jurisdiction as a federal court, this is not such a question of jurisdiction as goes to the Supreme Court under this section, but the appeal in such case would go to the circuit court of appeals.[12]

Same—Jurisdiction of Circuit Court of Appeals When Jurisdictional Questions Are Involved

Notwithstanding the provision of section 238 that the appeal shall be taken to the Supreme Court when the jurisdiction of the court is in issue, there are many circumstances under which the circuit court of appeals can consider jurisdictional questions. This must first be discussed in connection with appeals by defendant. Suppose that in such a case the defendant pleads to the jurisdiction, and his plea is decided against him. He cannot then appeal to the Supreme Court, for that would not be a final decree. The court would overrule his plea, and proceed with the case. If it is finally decided against him on the merits, then he has an election either to take the jurisdictional question alone to the Supreme Court, and have it decided there, or to appeal the whole case from the final decree on the merits to the circuit court of appeals. In such case, the latter, having acquired jurisdiction by reason of the appeal of the whole case, can consider the question of jurisdiction of the lower court, for such question is necessarily involved in disposing of the whole case. In such case, however, it may, in its discretion, certify the question of jurisdiction up to the Supreme Court under section 239 giving it the right to ask the instruction of the Supreme Court on any question arising in a case; or the Supreme Court itself may issue its writ of certiorari to the circuit court of appeals, and bring up the whole case.[13]

[12] SMITH v. McKAY, 161 U. S. 355, 16 Sup. Ct. 490, 40 L. Ed. 731; Blythe v. Hinckley, 173 U. S. 501, 19 Sup. Ct. 497, 43 L. Ed. 783; Kansas City N. W. R. Co. v. Zimmerman, 210 U. S. 336, 28 Sup. Ct. 730, 52 L. Ed. 1084. *See "Courts," Dec. Dig. (Key-No.) § 405.*

[13] McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. 118, 35 L. Ed. 893;

The question of jurisdiction may also be complicated with other questions on appeals by the plaintiff, and under certain circumstances the circuit court of appeals can consider such a question. Suppose the trial court decides that it has no jurisdiction. That is a final decree, and in such case the plaintiff must go straight to the Supreme Court on a certificate of the jurisdictional question. Suppose, on the other hand, that the lower court decides in favor of its jurisdiction; that the case proceeds on its merits, and is decided in favor of the defendant on the merits. In such case the plaintiff takes the whole case to the circuit court of appeals, for he cannot complain of a decision upholding the jurisdiction, and his only ground of complaint is the action of the court on the merits. In such case the circuit court of appeals may, in its discretion, certify the question of jurisdiction to the Supreme Court.

Suppose, again, that the jurisdiction is sustained; that the case goes on to trial, and is finally decided for the plaintiff, but for a less amount than he claims. In such case, if the defendant has taken an appeal to the circuit court of appeals, the plaintiff can take a cross-appeal to the same court. If the defendant has gone to the Supreme Court on the jurisdictional question, the plaintiff can appeal independently to the circuit court of appeals; but in such case the latter court will suspend action until the Supreme Court has decided the question of jurisdiction on the defendant's appeal.[14]

The Supreme Court can consider the question of jurisdiction in such case only on certificate, and, if the case has

U. S. v. JAHN, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; Meeker v. Lehigh V. R. Co., 183 Fed. 548, 106 C. C. A. 94. *See "Courts," Dec. Dig. (Key-No.) § 405; Cent. Dig. § 1103.*

[14] U. S. v. JAHN, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; Anglo-American Provision Co. v. Provision Co., 191 U. S. 376, 24 Sup. Ct. 93, 48 L. Ed. 228; Morrisdale Coal Co. v. Pennsylvania R. Co., 183 Fed. 929, 106 C. C. A. 269. *See "Courts," Dec. Dig. (Key-No.) § 405; Cent. Dig. § 1103.*

been taken to the circuit court of appeals, the Supreme Court will not consider an appeal, though it would otherwise have jurisdiction by virtue of some of the other clauses; for the policy of the law is in favor of only one appeal, and it will not permit separate appeals to the circuit court of appeals and the Supreme Court.[15]

Same—Course of Appeal when Other Classes of Section Are in Issue

The only class of the section which requires a certificate taking up a single question is that relating to jurisdiction. In the other classes named, the whole case goes up. Hence the principles which regulate the course of appeal in these cases are a little different from those already discussed. In the first place, if the plaintiff's own pleading shows that the case turned upon any of the questions named in the section—as, for instance, a federal constitutional question—the appeal must go to the Supreme Court alone.[16] It is, however, frequently the case that the jurisdiction is invoked in the first place on one ground, and that questions of this character subsequently arise. For instance, suppose the plaintiff bases his right of suit in the first instance in his pleadings on the ground of diverse citizenship. In such case, under section 128, the circuit court of appeals, if that were the only question involved, would have final jurisdiction. But suppose the defendant in such case raises a federal constitutional question in his plea or answer, or such a question arises in some subsequent stage of the case. Under such circumstances, the case could be taken to the circuit court of appeals, because the original ground of ju-

[15] ROBINSON v. CALDWELL, 165 U. S. 359, 17 Sup. Ct. 343, 41 L. Ed. 745. Where the sole question decided in the lower court is one of jurisdiction, a petition for a writ of error and allowance of same on that sole ground is equivalent to a certificate. U. S. v. Larkin, 208 U. S. 333, 28 Sup. Ct. 417, 52 L. Ed. 517. *See "Courts," Dec. Dig. (Key-No.) §§ 385, 405.*

[16] Union & Planters' Bank v. Memphis, 189 U. S. 71, 23 Sup. Ct. 604, 47 L. Ed. 712; Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 24 Sup. Ct. 376, 48 L. Ed. 496. *See "Courts," Dec. Dig. (Key-No.) § 382; Cent. Dig. §§ 1019, 1020.*

risdiction was diverse citizenship, or it could be taken first to the Supreme Court, if this subsequent question was a pivotal question in the case, but the litigant cannot do both, one appeal being his limit.[17] If, however, the question is a different one from those enumerated in section 238—as, for instance, a case turning upon conflicting state land grants—the appeal is to the circuit court of appeals alone.[18] But if the jurisdiction in the first instance was not based solely on diverse citizenship, the decision in the circuit court of appeals is not final.[19] If the constitutional question on which the jurisdiction of the trial court is invoked is decided in plaintiff's favor, but the main case against him, he must appeal to the circuit court of appeals, not to the Supreme Court, for an appeal by him in such case would involve no constitutional question.[20]

SAME—INSTANCES OF THE JURISDICTION

175. The following are important instances in which the circuit court of appeals exercises appellate jurisdiction:

(a) Certain jurisdictional, constitutional or treaty questions not jurisdictional, under the circumstances just discussed.

[17] American Sugar Refining Co. v. New Orleans, 181 U. S. 277, 21 Sup. Ct. 646, 45 L. Ed. 859; HUGULEY MFG. CO. v. GALETON COTTON MILLS, 184 U. S. 290, 22 Sup. Ct. 452, 46 L. Ed. 546; Ayres v. Polsdorfer, 187 U. S. 585, 23 Sup. Ct. 196, 47 L. Ed. 314; Watkins v. King, 118 Fed. 524, 55 C. C. A. 290. *See "Courts," Dec. Dig. (Key-No.) § 405.*

[18] Ayres v. Polsdorfer, 187 U. S. 585, 23 Sup. Ct. 196, 47 L. Ed. 314. *See "Courts," Dec. Dig. (Key-No.) §§ 385, 405.*

[19] HUGULEY MFG. CO. v. GALETON COTTON MILLS, 184 U. S. 290, 22 Sup. Ct. 452, 46 L. Ed. 546; Northern Pac. R. Co. v. Soderberg, 188 U. S. 526, 23 Sup. Ct. 365, 47 L. Ed. 575; Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 24 Sup. Ct. 376, 48 L. Ed. 496. *See "Courts," Dec. Dig. (Key-No.) §§ 385, 405.*

[20] Anglo-American Provision Co. v. Provision Co. No. 1, 191 U. S. 376, 24 Sup. Ct. 93, 48 L. Ed. 226. *See "Courts," Dec. Dig. (Key-No.) §§ 385, 405.*

(b) Criminal cases.
(c) Habeas corpus cases.
(d) Bankruptcy cases.
(e) Claims against the United States.
(f) Suits by the United States.
(g) Interstate Commerce Commission cases.
(h) Decisions of territorial courts.
(i) Cases depending on diverse citizenship.
(j) Cases involving patent laws.
(k) Cases involving revenue laws.
(l) Admiralty cases.

In any of the above named instances the appeal may be to the Supreme Court of the United States when any of the questions mentioned in section 238 is involved in the case.

In bankruptcy matters the circuit court of appeals has a general supervisory appellate jurisdiction over the lower courts in matters of law. It has appellate jurisdiction by appeal or writ of error.

(a) From a judgment adjudging or refusing to adjudge the defendant a bankrupt;
(b) From a judgment granting or denying a discharge;
(c) From a judgment allowing or rejecting a debt or claim of five hundred dollars or over.

Jurisdiction over Criminal Cases

The act, as originally drawn, gave jurisdiction both over cases of conviction of capital crimes and of infamous offenses. This was amended by the act of January 20, 1897.[21] But section 128 of the Judicial Code restored the jurisdiction of the circuit court of appeals over all criminal cases. In these cases the only method of reviewing the decision of the trial court is by writ of error, and the only questions reviewable are questions of law.[22]

[21] 29 Stat. 492, c. 68 (U. S. Comp. St. 1901, p. 556).
[22] Bucklin v. U. S., 159 U. S. 680, 16 Sup. Ct. 182, 40 L. Ed. 304. *See "Courts," Dec. Dig. (Key-No.) § 405; Cent. Dig. § 1101.*

Appeals in Habeas Corpus Cases

Under sections 763 and 764 of the Revised Statutes,[23] the appeal from a district court decision in a habeas corpus case went to the circuit court, and the appeal from a circuit court decision went to the Supreme Court. By the act of March 3, 1891, as has been seen, the appellate jurisdiction of the circuit court was abolished; and consequently appeals in habeas corpus cases, both from the district court and the circuit court, went, as a rule, to the circuit court of appeals. Then the abolition of the circuit court by the Judicial Code leaves only the district court to consider. In such cases pending in the district court, an appeal would lie not only from an order of the court, but also from an order of the judge at chambers.[24]

But while, as stated above, appeals in habeas corpus cases, in the absence of special grounds of jurisdiction, go to the circuit court of appeals, they would go to the Supreme Court if the case turned on any one of the classes set forth in section 238 of the Judicial Code, above quoted; that is, cases involving jurisdictional questions and certain federal questions. The result is that many of these cases necessarily go to the Supreme Court, for the classes of habeas corpus cases of which federal courts have jurisdiction are composed largely of cases involving such questions, as will be seen by reference to section 753 of the Revised Statutes.[25] The method of review is appeal, not writ of error.[26]

[23] U. S. Comp. St. 1901, pp. 594, 595.

[24] Webb v. York, 74 Fed. 753, 21 C. C. A. 65. *See "Courts," Dec. Dig. (Key-No.) § 405; Cent. Dig. § 1099.*

[25] U. S. Comp. St. 1901, p. 592; Ex parte Lennon, 150 U. S. 393, 14 Sup. Ct. 123, 37 L. Ed. 1120; Craemer v. State, 168 U. S. 124, 18 Sup. Ct. 1, 42 L. Ed. 407; Rice v. Ames, 180 U. S. 371, 21 Sup. Ct. 406, 45 L. Ed. 577; Dimmick v. Tompkins, 194 U. S. 540, 24 Sup. Ct. 780, 48 L. Ed. 1110; Pettit v. Walshe, 194 U. S. 205, 24 Sup. Ct. 657, 48 L. Ed. 938. *See "Courts," Dec. Dig. (Key-No.) § 405; Cent. Dig. § 1099; "Habeas Corpus," Dec. Dig. (Key-No.) § 113.*

[26] Fisher v. Baker, 203 U. S. 174, 27 Sup. Ct. 135, 51 L. Ed. 142.

Appeals in Bankruptcy

Quite an extensive jurisdiction is vested in the circuit court of appeals by virtue of the provisions of the bankrupt law. Sections 24 and 25 of that act [27] provide as follows:

"Sec. 24 (a) The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

"(b) The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

"Sec. 25 (a) That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the territories, in the following cases, to wit,

"(1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt;

"(2) From a judgment granting or denying a discharge; and

"(3) From a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be

7 Ann. Cas. 1018; Wong Heung v. Elliott, 179 Fed. 110, 102 C. C. A. 408. *See "Courts," Dec. Dig. (Key-No.) § 405; Cent. Dig. § 1099; "Habeas Corpus," Dec. Dig. (Key-No.) § 113.*

[27] U. S. Comp. St. 1901, pp. 3431, 3432.

taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be. * * *"

Same—Supervisory Review

It will be seen from these sections that there are two methods of reviewing the action of the lower court in the circuit court of appeals—one by the last paragraph of section 24, which is an informal supervisory power of review, and the other under the provisions of section 25, which is a formal appeal in the limited cases therein specified.

Considering the supervisory power first, it appears that only matters of law can be reviewed under this proceeding.[28] In such cases the decision of the circuit court of appeals is final, subject only to the issue of a certiorari provided by the act of March 3, 1891.[29] This right of supervision, however, extends only to bankruptcy proceedings proper.[30] A plenary suit by the trustee against third parties is not such an order of administration, but is a separate suit, and is not reviewable by this process.[31] On the other hand, a claim of a third party against a fund in the hands of a trustee is a bankruptcy matter, and is reviewable as

[28] Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; ELLIOTT v. TOEPPNER, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200; In re EGGERT, 102 Fed. 735, 43 C. C. A. 1. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 441, 449, 456.*

[29] HOLDEN v. STRATTON, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 448, 441, 449.*

[30] HOLDEN v. STRATTON, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116; First Nat. Bank v. Chicago Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051. The character of questions included in bankruptcy proceedings proper is well explained by Judge Lurton in Re Mueller, 135 Fed. 711, 68 C. C. A. 349. See, also, Barnes v. Pampel, 192 Fed. 525, 113 C. C. A. 81. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 440, 441.*

[31] In re Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725; In re Hamilton Automobile Co., 198 Fed. 856, 117 C. C. A. 135. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 440, 441.*

far as any legal questions are involved.[32] So, too, an order entered by the bankruptcy court on petition of a creditor to sell the bankrupt's homestead is reviewable as an administration order.[33]

The "proceedings of the several inferior courts of bankruptcy within their jurisdiction" mean the proceedings of the district courts within the territorial jurisdiction of the corresponding Circuit Court of Appeals.[34]

As illustrations of the legal questions reviewable, it has been held that an order requiring a bankrupt to transfer a liquor license, which is transferable, with the consent of certain governmental authorities, under the state law, can be reviewed as to questions of law in this proceeding.[35] So a claim of ownership to funds in trustee's hands is reviewable as to matters of law.[36]

Where the question involved is close on the border line between the cases reviewable under this section and the cases appealable under the next section, the party may take both proceedings, and the appellate court will act upon the one which it considers the proper one.[37] The question whether a creditor can amend his specifications in opposition to the bankrupt's discharge is reviewable under this provision.[38] As to the form of such a petition, it should

[32] Antigo Screen Door Co., 123 Fed. 249, 59 C. C. A. 248. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 440, 441.*

[33] Ingram v. Wilson, 125 Fed. 913, 60 C. C. A. 618. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 440, 441.*

[34] In re Seebold, 105 Fed. 910, 45 C. C. A. 117. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 441, 451.*

[35] Fisher v. Cushman, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 440, 441, 457.*

[36] Hutchinson v. Le Roy, 113 Fed. 202, 51 C. C. A. 159; Same v. Otis, 115 Fed. 937, 53 C. C. A. 419; Id., 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179. *See "Bankruptcy," Dec. Dig. (Key-No.) § 440, 441.*

[37] In re Worcester County, 102 Fed. 808, 42 C. C. A. 637. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 440, 441.*

[38] Goodman v. Curtis, 174 Fed. 644, 98 C. C. A. 398. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 440, 441.*

state the question involved, and be accompanied by enough of the record in the case to show how it arose and was determined.[39]

Such petition should be filed in the circuit court of appeals, and cannot be allowed, nor the proceeding matured, by the district judge.[40]

Same—Procedure by Appeal or Writ of Error

Although the language of section 25 speaks simply of appeals, the Supreme Court has held that a writ of error is proper when the proceeding appealed from in its nature should be taken up by such a writ, and the thirty-seventh [41] bankruptcy order provides: "In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. * * *"

Accordingly, when the procedure has involved a jury trial, as is authorized by some provisions of the bankrupt law, it necessarily follows that there must be bills of exceptions, and that such a case shall be taken to the circuit court of appeals, not by appeal, but by writ of error.[42]

The appealable cases in section 25 are, as appears from the quotation above, only three in number. The first of these is from a judgment adjudging or refusing to adjudge the defendant a bankrupt.[43]

The second is from a judgment granting or denying a

[39] Courier Journal Job Printing Co. v. Schaefer-Meyer Brewing Co., 101 Fed. 699, 41 C. C. A. 614; In re Taft, 133 Fed. 511, 66 C. C. A. 385. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 440, 444.*

[40] In re Williams (D. C.) 105 Fed. 906. *See "Bankruptcy," Dec. Dig. (Key-No.) § 444.*

[41] 89 Fed. xiv, 32 C. C. A. xxxvi; 18 Sup. Ct. ix.

[42] Duncan v. Landis, 106 Fed. 839, 45 C. C. A. 666; ELLIOTT v. TOEPPNER, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200. *See "Bankruptcy," Dec. Dig. (Key-No.) § 449; Cent. Dig. § 915.*

[43] ELLIOTT v. TOEPPNER, 187 U. S. 327, 23 Sup. Ct. 133, 47

discharge. In re Adler [44] holds that under this provision an appeal from an order refusing to confirm or confirming a composition will not lie; but in U. S. v. Hammond [45] the contrary opinion was reached, on the ground that the action of the court in that particular settled the question of discharge, and this seems to be based on better reason. The usual presumptions in favor of the action of an inferior court prevail on such appeals. Where a discharge has been refused on the ground of fraud, the error must be manifest before there will be a reversal.[46]

The third and much the most usual class of appeals is from judgments allowing or rejecting a debt or claim of five hundred dollars or over. This means a money demand, not a demand for specific property.[47]

If the only question about the debt was its priority, and not its validity, the procedure would have to be by review; [48] but, when an appeal is taken from the allowance or rejection of such a claim, the court can, as incidental to that appeal, consider the question of rank or lien.[49]

The appeal may be taken by the trustee from an order denying his motion to expunge a claim.[50] In one case [51]

L. Ed. 200. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 449, 455; Cent. Dig. § 916.*

[44] (D. C.) 103 Fed. 444. *See "Bankruptcy," Dec. Dig. (Key-No.) § 455; Cent. Dig. § 916.*

[45] 104 Fed. 862, 44 C. C. A. 229. *See "Bankruptcy," Dec. Dig. (Key-No.) § 455; Cent. Dig. § 916.*

[46] Osborne v. Perkins, 112 Fed. 127, 50 C. C. A. 158. *See "Bankruptcy," Dec. Dig. (Key-No.) § 467; Cent. Dig. § 929.*

[47] In re Whitener, 105 Fed. 180, 44 C. C. A. 434; HOLDEN v. STRATTON, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116. *See "Bankruptcy," Dec. Dig. (Key-No.) § 455; Cent. Dig. § 916.*

[48] In re Worcester County, 102 Fed. 808, 42 C. C. A. 637. *See "Bankruptcy," Dec. Dig. (Key-No.) § 440; Cent. Dig. § 915.*

[49] Cunningham v. Insurance Bank, 103 Fed. 932, 43 C. C. A. 377; Hutchinson v. Otis, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179. *See "Bankruptcy," Dec. Dig. (Key-No.) § 467; Cent. Dig. § 929.*

[50] Livingstone v. Heineman, 120 Fed. 786, 57 C. C. A. 154. *See "Bankruptcy," Dec. Dig. (Key-No.) § 457; Cent. Dig. § 917.*

[51] In re Roche, 101 Fed. 956, 42 C. C. A. 115. *See "Bankruptcy," Dec. Dig. (Key-No.) § 457; Cent. Dig. § 917.*

it was held that any party affected, including a creditor whose dividend was diminished, could take an appeal; but the better opinion is that the trustee represents the creditors in such a matter, and that only he can take such an appeal, the remedy of objecting creditors being an application to the court to require an appeal by the trustee.[52] The right of appeal under this section does not exist in contests over an insurance policy claimed to be exempt, as that is not one of the enumerated classes.[53]

Same—Claims against the United States under Section 24, Paragraph 20, of the Judicial Code

In the classes therein enumerated, the course of appeal is to the circuit court of appeals, unless one of the questions named in section 238 of the Judicial Code exists, in which case it goes to the Supreme Court.[54]

This question has been touched upon in the chapter which discusses the jurisdiction of the courts in suits against the United States.[55]

Suits by the United States

Appeals in these cases also go to the circuit court of appeals. In U. S. v. American Bell Telephone Co.,[56] which was a suit to cancel a patent, the Supreme Court held that the circuit court of appeals had appellate jurisdiction over such a case, though its decision would not be final, as the fact that the United States were parties gave another in-

[52] Chatfield v. O'Dwyer, 101 Fed. 797, 42 C. C. A. 30; Foreman v. Burleigh, 109 Fed. 313, 48 C. C. A. 376; In re Mexico Hardware Co. (D. C.) 197 Fed. 650; In re Pittsburg Lead & Zinc Co. (D. C.) 198 Fed. 316. *See "Bankruptcy," Dec. Dig. (Key-No.) § 457; Cent. Dig. § 917.*

[53] HOLDEN v. STRATTON, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116. *See "Bankruptcy," Dec. Dig. (Key-No.) § 455; Cent. Dig. § 916.*

[54] U. S. v. Harsha, 172 U. S. 567, 19 Sup. Ct. 294, 43 L. Ed. 556; U. S. v. Coudert, 73 Fed. 505, 19 C. C. A. 543; Coudert v. U. S., 175 U. S. 178, 20 Sup. Ct. 56, 44 L. Ed. 122. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 451–453; Cent. Dig. § 914.*

[55] Ante, p. 190.

[56] 159 U. S. 548, 16 Sup. Ct. 69, 40 L. Ed. 255. *See "Courts," Dec. Dig. (Key-No.) §§ 382, 406.*

dependent ground of jurisdiction, and prevented the case from turning simply upon the question that it was a suit under the patent laws. It was held in the same case that a suit to cancel a patent was not a suit under the patent laws in the sense in which it was used in section 6 of the act of March 3, 1891, now section 128 of the Judicial Code.

Interstate Commerce Commission Cases

Appeals by parties aggrieved under the provisions of this act also go to the circuit court of appeals, in the absence of any special grounds of jurisdiction in the Supreme Court.[57]

Appeals from Special Courts

Under sections 128, 131, and 134 of the Judicial Code, the decisions of the district court for Hawaii, the United States court for China and the district court for Alaska are reviewable by the circuit court of appeals, subject to the provisions conferring jurisdiction on the Supreme Court in the special kind of questions which it is the policy of Congress to remit to that court.

SAME—CASES IN WHICH THE DECISION OF THE CIRCUIT COURT OF APPEALS IS FINAL

176. The decision of the circuit court of appeals is final in the following classes of cases on appeal:

(a) Cases depending on diverse citizenship.

(b) Cases involving patent or copyright laws.

(c) Cases involving revenue laws.

(d) Criminal cases.

(e) Admiralty cases.

[57] Interstate Commerce Commission v. Atchison, T. & S. F. R. Co., 149 U. S. 264, 13 Sup. Ct. 837, 37 L. Ed. 727; Interstate Commerce Commission v. Baird, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860; Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 192 Fed. 475, 112 C. C. A. 637; A. J. Phillips Co. v. Grand Trunk Western R. Co., 195 Fed. 12, 115 C. C. A. 94. *See "Courts," Dec. Dig. (Key-No.) § 405; Cent. Dig. § 1099.*

In the above classes of cases, however, the appeal may be to the Supreme Court of the United States when any of the questions mentioned in section 238 of the Judicial Code are involved.

These are enumerated in section 128 of the Judicial Code, and are as follows: "In which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws and in admiralty cases."

If, however, the pleadings show that the ground on which the case is based and on which it turned was a federal question, but not one of those enumerated in section 238, then the decision of the circuit court of appeals is not final.[58] But the mere fact that such a federal question might have been raised does not prevent the decision of the circuit court of appeals from being final when it was not actually raised.[59]

If the jurisdiction of the lower court rests both on the diverse citizenship and the existence of a federal question, the jurisdiction of the circuit court of appeals is not final.[60]

It frequently happens that jurisdiction would vest in the trial court in the first instance by reason of diverse citizenship, and that constitutional questions subsequently arise in the case. Under these circumstances, if the court

[58] FLORIDA CENT. & P. R. CO. v. BELL, 176 U. S. 321, 20 Sup. Ct. 399, 44 L. Ed. 486. *See "Courts," Dec. Dig. (Key-No.) §§ 382, 405.*

[59] World's Columbian Exposition v. U. S., 56 Fed. 654, 6 C. C. A. 58; Empire State-Idaho Mining & Developing Co. v. Hanley, 205 U. S. 225, 27 Sup. Ct. 476, 51 L. Ed. 779. *See "Courts," Dec. Dig. (Key-No.) §§ 382, 405.*

[60] Mississippi Railroad Commission v. Illinois Cent. R. Co., 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209; Railroad Commission of Ohio v. Worthington, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004. *See "Courts," Dec. Dig. (Key-No.) §§ 382, 405.*

acquired jurisdiction originally on the ground of diverse citizenship alone, an appeal will lie to the circuit court of appeals; and, if such an appeal is taken, the decision of that court is final.[61]

The Supreme Court also, however, would have jurisdiction if a constitutional question should subsequently arise, though the jurisdiction originally vested on the ground of diverse citizenship; for it could not have been the intent of Congress to deprive it of the right to pass upon such a question. The only qualification is that the litigant cannot take appeals to both courts.[62] A suit by a national bank against a citizen of another state depends on diverse citizenship, and the decision of the circuit court of appeals is final in such case.[63]

Patent Cases

This is one of the class in which the decision of the circuit court of appeals is made final, but the simple fact that a patent may come before the court in litigation does not make the case a patent case under such circumstances. The cases included in this description have been described by the Supreme Court as follows: "Actions at law for infringement, and suits in equity for infringement, for interference, and to obtain patents, are suits which clearly arise under the patent laws; being brought for the purpose of vindicating rights created by those laws, and coming strictly within the avowed purpose of the act to relieve this court of that

[61] Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 14 Sup. Ct. 35, 37 L. Ed. 1030; Pope v. Louisville, N. A. & C. R. Co., 173 U. S. 573, 19 Sup. Ct. 500, 43 L. Ed. 814; Spencer v. Duplan Silk Co., 191 U. S. 526, 24 Sup. Ct. 174, 48 L. Ed. 287. *See "Courts," Dec. Dig. (Key-No.) §§ 382, 405.*

[62] Cincinnati, H. & D. Ry. Co. v. Thiebaud, 177 U. S. 615, 20 Sup. Ct. 822, 44 L. Ed. 911; American Sugar Refining Co. v. City of New Orleans, 181 U. S. 277, 21 Sup. Ct. 646, 45 L. Ed. 859. *See "Courts," Dec. Dig. (Key-No.) §§ 382, 405.*

[63] CONTINENTAL NAT. BANK v. BUFORD, 191 U. S. 119, 24 Sup. Ct. 54, 48 L. Ed. 119. *See "Courts," Dec. Dig. (Key-No.) §§ 382, 405.*

burden of litigation which operated to impede the disposition of cases of peculiar gravity and general importance. We are of opinion that it is reasonable to assume that the attention of Congress was directed to this class of cases, and that the language was used as applicable only to them." [64]

Accordingly it was held in the case from which the above quotation is taken that a suit by the United States to cancel a patent as improperly issued was not a suit "arising under the patent laws," in the sense of this act. So, too, a suit to enjoin the collection of a state tax on a patent right was not a suit under the patent laws, but was a suit involving the validity of a state statute, and hence the appeal should be to the Supreme Court, and not to the circuit court of appeals.[65]

Revenue Laws

In this class of cases, also, the decision of the circuit court of appeals is made final. A revenue law is defined by the Supreme Court as a law imposing duties on imposts or tonnage, or a law providing in terms for revenue; that is to say, a law which is directly traceable to the power granted to Congress by section 8, art. 1, of the Constitution, "to lay and collect taxes, duties, imposts, and excises." [66] The decision of the circuit court reviewing the action of a board of appraisers under the act of June 10, 1890 (26 Stat. 131, c. 407 [U. S. Comp. St. 1901, p. 1886]), is reviewable by

[64] U. S. v. American Bell Telephone Co., 159 U. S. 548, 553, 554, 16 Sup. Ct. 69, 40 L. Ed. 255. See, also, ante, pp. 78, 242; The Fair v. Kohler Die & Specialty Co., 228 U. S. 22, 33 Sup. Ct. 410, 57 L. Ed. ——. *See "Courts," Dec. Dig. (Key-No.) §§ 290, 405.*

[65] Holt v. Indiana Mfg. Co., 80 Fed. 1, 25 C. C. A. 301; Id., 176 U. S. 68, 20 Sup. Ct. 272, 44 L. Ed. 374. *See "Courts," Dec. Dig. (Key-No.) §§ 290, 405.*

[66] U. S. v. Hill, 123 U. S. 681, 8 Sup. Ct. 308, 31 L. Ed. 275. Compare Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 24 Sup. Ct. 376, 48 L. Ed. 496, and U. S. v. Norton, 91 U. S. 566, 23 L. Ed. 454; ante, p. 77. *See "Courts," Dec. Dig. (Key-No.) §§ 297, 405; Cent. Dig. § 339.*

the circuit court of appeals as a revenue law, and the judgment of the latter court in such case is final.[67]

Criminal Laws

In these cases, too, the decision of the circuit court of appeals is final. A proceeding by contempt is so far criminal that the Supreme Court has no jurisdiction of it, and the decision of the circuit court of appeals is final.[68]

Admiralty Cases

Here, too, the decision of the circuit court of appeals is final. In this respect an appeal from the decision of the court in the ordinary questions arising out of limited liability proceedings is an admiralty case reviewable only by the circuit court of appeals.[69] But when a jurisdictional question arises, either in a limited liability case or any other admiralty case, then the appeal goes to the Supreme Court, under section 238 of the Judicial Code.[70]

In reference to all the classes of cases discussed in this connection, as cases in which the decision of the circuit court of appeals is final, it must be borne constantly in mind that in these, as in all other decisions of the circuit court of appeals, the Supreme Court may obtain jurisdiction either to review special questions arising, in case the circuit court of appeals certifies such questions up to it, or to decide the whole case, if, when such questions are certified up, it thinks proper to require the whole record to be sent to it, or if, independent of any such certificate from the circuit court of appeals, it decides on application for a certiorari to bring the whole case up by that process.

[67] U. S. v. Hopewell, 51 Fed. 798, 2 C. C. A. 510; SAME v. JAHN, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; Anglo-Californian Bank v. U. S., 175 U. S. 37, 20 Sup. Ct. 19, 44 L. Ed. 64. But the Judicial Code has carried the provisions of the act of August 5, 1909, into sections 196–198, which confer this jurisdiction on the Court of Customs Appeals. *See "Courts," Dec. Dig. (Key-No.) §§ 297, 405; Cent. Dig. § 839.*

[68] O'Neal v. U. S., 190 U. S. 36, 23 Sup. Ct. 776, 47 L. Ed. 945. *See "Courts," Dec. Dig. (Key-No.) § 405; Cent. Dig. § 1101.*

[69] Oregon R. & Nav. Co. v. Balfour, 179 U. S. 55, 21 Sup. Ct. 28, 45 L. Ed. 82. *See "Courts," Dec. Dig. (Key-No.) §§ 382, 405.*

[70] The Alliance, 70 Fed. 273, 17 C. C. A. 124; The Annie Faxon,

SAME—POWER OF CIRCUIT COURT OF APPEALS TO ISSUE AUXILIARY WRITS

177. The circuit court of appeals can issue auxiliary writs only incidentally to cases pending in it.

Section 262 of the Judicial Code reads as follows: "The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

Under this provision, however, it has been uniformly held that the circuit court of appeals has no power to issue any of these writs as independent proceedings, but only as incidental to a case regularly brought before it by appeal or writ of error. For instance, in U. S. v. Severens,[71] the issue of a mandamus was refused where no case was pending in the court; and in U. S. v. Judges of United States Court of Appeals [72] it was held that such a writ could not be used in lieu of an appeal, but only in aid of a jurisdiction already acquired. Nor will this court issue a certiorari as an original process.[73] The same conclusion was reached as to the issue of a writ of prohibition.[74] So as to habeas corpus.[75]

87 Fed. 961, 31 C. C. A. 325; The Presto, 93 Fed. 522, 35 C. C. A. 394. *See "Courts," Dec. Dig. (Key-No.)* §§ *382, 405.*

[71] 71 Fed. 768, 18 C. C. A. 314. See, also, McClellan v. Carland, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. Ed. 762. *See "Courts," Dec. Dig. (Key-No.)* § *404.*

[72] 85 Fed. 177, 29 C. C. A. 78. See, also, Vacuum Cleaner Co. v. Platt, 196 Fed. 398, 116 C. C. A. 220. *See "Courts," Dec. Dig. (Key-No.)* § *404.*

[73] Travis County v. King Iron Bridge & Mfg. Co., 92 Fed. 690, 34 C. C. A. 620. *See "Courts," Dec. Dig. (Key-No.)* § *404.*

[74] In re PAQUET, 114 Fed. 437, 52 C. C. A. 239. *See "Courts," Dec. Dig. (Key-No.)* § *404.*

[75] Whitney v. Dick, 202 U. S. 132, 26 Sup. Ct. 584, 50 L. Ed. 963. *See "Courts," Dec. Dig. (Key-No.)* § *404.*

CHAPTER XXII

APPELLATE JURISDICTION (Continued)—THE SUPREME COURT

178. The Supreme Court of the United States—Its Organization.
179. The Appellate Jurisdiction of the Supreme Court—The Courts whose Decisions are Reviewable by the Supreme Court.
180. Appeals from the United States District Courts.
181. Appeals from the Circuit Courts of Appeals.
182. Appeals from Territorial Courts.
183. Appeals from the Court of Appeals of the District of Columbia.
184. Appeals from the Court of Claims.
185. Appeals from the Commerce Court.
186. Review of State Court Decisions.
187. Same—Constitutionality.
188. Same—The Proceedings Reviewable.
189. Same—The Courts whose Decisions are Reviewable.
190. Same—By Whom the Right of Review may be Invoked.
191. Same—Character of Questions Reviewable.
192. Same—How a Federal Question must be Raised or Shown by the Record.

THE SUPREME COURT OF THE UNITED STATES —ITS ORGANIZATION

178. The Supreme Court of the United States is the court exercising the highest powers of appellate jurisdiction; this jurisdiction comprising certain appeals from all of the other federal courts and from the state courts of last resort, according to regulations fixed by law.

The Supreme Court consists of a chief justice of the United States and eight associate justices, any six of whom constitute a quorum.

The judges of the Supreme Court are appointed by the President of the United States, and hold office during good behavior. Under the chief justice, the

associate justices take precedence according to the dates of their commissions, or, if their commissions are dated alike, according to their ages.

In another connection the original jurisdiction of the Supreme court has been discussed. It is now necessary to consider its appellate jurisdiction, which is far the most extensive body of law which it administers.

Composition of the Supreme Court

Section 215 of the Judicial Code provides: "The Supreme Court of the United States shall consist of a chief justice of the United States and eight associate justices, any six of whom shall constitute a quorum."

For a long time the court was composed of seven justices, but this number was afterwards increased to nine, the present number. Under section 216, the associate justices take precedence according to the dates of their commissions; if their commissions are dated alike, according to their ages.

Sessions of the Supreme Court

It is provided by section 230 of the Judicial Code that the court shall hold one term annually at the seat of government, commencing on the second Monday in October, and such adjourned or special terms as it may find necessary for the dispatch of business. In actual practice, on account of the pressure of business upon it, the court is in almost continuous session from October until the early part of the following May; only adjourning occasionally. and using even those adjournments for the purpose of writing up opinions in cases argued and submitted.

Appellate Jurisdiction of the Supreme Court—Sources and Regulation of

The second paragraph of the second section of article 3 of the Constitution provides:

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party,

the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

Hence its original jurisdiction springs directly from the Constitution, but its appellate jurisdiction is subject to regulation by Congress.[1]

THE APPELLATE JURISDICTION OF THE SUPREME COURT—THE COURTS WHOSE DECISIONS ARE REVIEWABLE BY THE SUPREME COURT

179. The Courts whose decisions are reviewable by the Supreme Court of the United States under regulations fixed by law are:

(a) The United States district courts.
(b) The United States circuit courts of appeals.
(c) The territorial courts, and courts of the dependencies.
(d) The courts of the District of Columbia.
(e) The court of claims.
(f) The commerce court.*
(g) State courts of last resort.

APPEALS FROM THE UNITED STATES DISTRICT COURTS

180. The Supreme Court exercises appellate jurisdiction directly over the district courts of the United States in the following cases:

(a) When jurisdictional questions are involved.
(b) Prize causes.

[1] National Exchange Bank v. Peters, 144 U. S. 570, 12 Sup. Ct. 767, 36 L. Ed. 545. *See "Courts," Dec. Dig. (Key-No.) § 380; Cent. Dig. § 996.*

* Since abolished. See post, p. 701.

(c) Some criminal causes.
(d) Constitutional or treaty questions, comprehending:
(1) The construction or application of the federal Constitution;
(2) The constitutionality of a federal law;
(3) The validity or construction of a treaty;
(4) The constitutionality of a state law.
(e) Suits by the United States under anti-trust legislation.

The most of the litigation in these courts is reviewable, as has been seen, by the circuit court of appeals, and the jurisdiction of the Supreme Court is the exception and not the rule; but, under section 238 of the Judicial Code, the latter has jurisdiction over the decisions of the district courts in exceptional cases of general importance. The section reads: "Appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii, direct to the Supreme Court, in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

(a) Jurisdictional Questions

The first paragraph of the act requires the appeal to go straight to the Supreme Court where the jurisdiction of the lower court is in issue, but in such case the court can only consider the question of jurisdiction, and not the case on the merits. In this respect this first class differs from the

subsequent ones. In order to give the Supreme Court jurisdiction over such a question, there must be a certificate of the court accompanying the appeal or writ of error, and without such certificate the court has no power to review even a question of jurisdiction.[2] This certificate must be made by the lower court during the term at which final judgment is rendered, and cannot be made at a subsequent term.[3] There is no specific form which this certificate must follow. It should be, in the main, similar to the old form adopted by the courts when certifying to the Supreme Court particular questions or propositions of law wherein they differed in opinion.[4] In no event can the Supreme Court be required, even where the case turned on a jurisdictional question, to search through the record and exhume it from a great mass of pleadings or rulings.[5] At the same time, there is no magic in the mere use of the word "certified," but anything which may present to the appellate court the single, well-defined question of jurisdiction, severed from all collateral questions, will be sufficient. For instance, in one case the parties who had obtained a receiver in a state court applied to a federal court to discharge a receiver which the latter court had appointed; claiming that the state court had first obtained jurisdiction over the

[2] ROBINSON v. CALDWELL, 165 U. S. 359, 17 Sup. Ct. 343, 41 L. Ed. 745; ante, p. 477. A bill of exceptions may be used to present the question if it does not otherwise appear from the record, but, under well-known principles of pleading, is unnecessary if the fact otherwise appears from the record. C. H. Nichols Lumber Co. v. Franson, 203 U. S. 278, 27 Sup. Ct. 102, 51 L. Ed. 181; Frederic L. Grant Shoe Co. v. W. M. Laird Co., 212 U. S. 448, 29 Sup. Ct. 332, 53 L. Ed. 591. *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. § 1013.*

[3] COLVIN v. JACKSONVILLE, 158 U. S. 456, 15 Sup. Ct. 866, 39 L. Ed. 1053. This case contains a good form of certificate of a jurisdictional question. *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. § 1013.*

[4] Maynard v. Hecht, 151 U. S. 324, 14 Sup. Ct. 353, 38 L. Ed. 179. *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. § 1013.*

[5] Van Wagenen v. Sewall, 160 U. S. 369, 16 Sup. Ct. 370, 40 L. Ed. 460. *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. § 1013*

subject-matter, and that its receiver was in prior possession. The federal court refused to discharge its receiver, and from this order an appeal was taken. The petition for an appeal set out the action of the lower court, and prayed for an appeal from the order taking and exercising jurisdiction; and the federal judge, in allowing the appeal, stated in the order that it was granted solely upon the question of jurisdiction. The Supreme Court held this sufficient, using the following language: "It is not necessary that the word 'certify' be formally used. It is sufficient if there is a plain declaration that the single matter which is by the record sent up to this court for decision is a question of jurisdiction, and the precise question clearly, fully, and separately stated. No mere suggestion that the jurisdiction of the court was in issue will answer. This court will not of itself search, nor follow counsel in their search of the record, to ascertain whether the judgment of the trial court did or did not turn on some question of jurisdiction. But the record must affirmatively show that the trial court sends up for consideration a single, definite question of jurisdiction." [6]

In another case [7] the record showed that there was a plea to the jurisdiction in the lower court on the ground that the suit was a collusive attempt to confer upon the federal court a jurisdiction not conferred upon it by law. The judgment of the court recited these pleas, the replications thereto, an agreed statement of facts, the recital that the court decided against the jurisdiction, the opinion of the court, and also a bill of exceptions reciting the ruling of the court on the jurisdictional point, and the exception thereto. The order allowing the writ of error also recited the ruling of the court on the question of jurisdiction, and

[6] Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660. *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. § 1013.*

[7] In re Lehigh Min. & Mfg. Co., 156 U. S. 322, 15 Sup. Ct. 375, 39 L. Ed. 438. *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. § 1013.*

allowed the appeal. It was held that this was a sufficient certificate of the question of jurisdiction.

In another case [8] the record showed that the only matter which had been tried in the lower court was a demurrer to a plea to the jurisdiction; that the decision of the court on that issue was against the jurisdiction, and dismissed the case; and the petition for the allowance of an appeal simply prayed for a review of the judgment holding that the court had no jurisdiction of the case, on which petition the writ of error was allowed. This was held a sufficient certificate under the statute.

In another case [9] the court had dismissed the action as not involving a controversy within the cognizance of the federal courts, and this appeared clearly on the face of the record. The petition for appeal alleged that the plaintiff

[8] Interior Const. & Imp. Co. v. Gibney, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401. See, also, The Jefferson, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. 125, 17 Ann. Cas. 907. *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. § 1013.*

[9] Huntington v. Laidley, 176 U. S. 668, 20 Sup. Ct. 526, 44 L. Ed. 630. The following was the certificate in this case: "A final decree having been entered herein, on the 25th day of June, 1898, dismissing this bill and the bill and amended bills therein: Now, therefore, this court, in pursuance of the second paragraph of the fifth section of the act of Congress approved March 3, 1891, and entitled 'An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' hereby certifies to the Supreme Court of the United States for decision the question of jurisdiction alone of this court over this cause as follows: Is this court without jurisdiction of this cause because of the pendency in the state court, prior to the commencement of this suit, of the action of ejectment in which John B. Laidley was plaintiff and the Central Land Co. of West Va. was defendant, which was begun in the circuit court of Cabell Co., West Va., on the first Monday in April, 1882, and of the other actions in ejectment brought prior to this cause in said state court by the said John B. Laidley as plaintiff in relation to the property in question in this suit, and of the chancery cause in which the Central Land Co. of West Va. was complainant and John B. Laidley and others were defendants, which was brought in said state court prior to the commencement of this cause?" *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. § 1013.*

was aggrieved by the decree dismissing the suit on the ground of want of jurisdiction, because of the pendency of a suit in the state court begun prior to the commencement of this cause, and the order provided that the appeal be allowed "as prayed for." The Supreme Court held that the allowance of appeal in this form was sufficient, under these circumstances, independent of the fact that the certificate itself was also sufficient.

In another case [10] the decree and the allowance of the appeal both showed that the only question in issue was jurisdiction. The court held that no separate certificate was necessary.

On the other hand, if the jurisdictional question appears in the record, not as the sole question passed upon, but only as one of many, and the order allowing the writ of error was in general terms, not specifying this single question of jurisdiction, that would not be a sufficient certificate, and the court would not take cognizance of the case under such circumstances.[11]

So, too, where the record of the case showed that it had turned, not upon a jurisdictional question, but upon the merits, even a certificate failing to present a clear-cut, single jurisdictional question would not give the court power to review. The case in which this principle was announced was a habeas corpus case in a district court in which the writ was issued to a county sheriff, and was prayed on the ground that the party confined under an indictment of a state court was acting at the time as a special agent of the general land office in the Department of the Interior of the United States. The court certified the

[10] **Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910.** See, also, Chicago v. Mills, 204 U. S. 321, 27 Sup. Ct. 286, 51 L. Ed. 504; Herndon-Carter Co. v. James N. Norris Son & Co., 224 U. S. 496, 32 Sup. Ct. 550, 56 L. Ed. 857. *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. § 1013.*

[11] **CHAPPELL v. U. S., 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510.** *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. § 1013.*

following questions to the Supreme Court as questions of jurisdiction:

(1) Whether this court has jurisdiction in the premises to discharge the petitioner, Charles A. M. Schlierholz, from the custody of John A. Hinkle, sheriff of Independence county, Ark., for the matters and things and under the circumstances set out in the record in this cause.

(2) Whether the proper order of this court, under the facts, should have been to remand said petitioner to the custody of the said sheriff of Independence county, Ark., to be dealt with by the Independence circuit court of the state, or to discharge him from said custody.

The Supreme Court held that this certificate was not sufficiently definite to be considered a certificate of a jurisdictional question—especially in connection with the fact that the record in the case did not show that any such question had arisen.[12] The petition for the appeal cannot take the place of such a certificate when it merely stated in general terms that the court acted without jurisdiction, but did not specify the special jurisdictional question arising, and the judge allowed the appeal generally in the form used when entire records are taken up. In such case, even a more definite statement of a jurisdictional question in the assignment of errors will not help.[13]

The questions which are considered jurisdictional in this connection have been discussed in the previous chapter. The jurisdiction meant is the jurisdiction in the case from which the appeal is taken, not the jurisdiction in a former case questioned by the latter case. For instance, where a suit is brought, questioning the validity of a foreclosure proceeding in a former suit, the jurisdiction of the court

[12] **Arkansas v. Schlierholz, 179 U. S. 598, 21 Sup. Ct. 229, 45 L. Ed. 335.** *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. § 1013.*

[13] **The Bayonne, 159 U. S. 687, 16 Sup. Ct. 185, 40 L. Ed. 305.** *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. § 1013.*

in this former suit cannot be considered.[14] And the question whether a suit against a state officer is in effect a suit against a state, is not a jurisdictional, but a constitutional, question, and cannot be considered under this clause of the statute.[15] On the other hand, the question whether the court ever obtained jurisdiction over the defendant by a valid service of process is a question of jurisdiction which can be certified up.[16] Under some circumstances, the Supreme Court can consider on appeals based on jurisdictional questions, not only matters of law, but matters of fact; as, for instance, in an action of ejectment, where the court had held on affidavits that the value of the land involved was less than two thousand dollars, the Supreme Court reviewed this finding on the facts, and reversed it.[17]

(*b*) *Prize Causes*

The section requires appeals to go direct to the Supreme Court "from the final sentences and decrees in prize causes." The reason is the international character of the question involved. Hence, where the question of international law was whether an unarmed fishing vessel not going knowingly to a blockaded port was a lawful prize, the question was taken to the Supreme Court.[18]

[14] Carey v. Houston & T. C. Ry. Co., 150 U. S. 170, 14 Sup. Ct. 63, 37 L. Ed. 1041. *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. §§ 1011–1021.*

[15] Illinois Cent. R. Co. v. Adams, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410. *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. §§ 1011–1021.*

[16] Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 30 Sup. Ct. 125, 54 L. Ed. 272; Davis v. Cleveland, C. C. & St. L. R. Co., 217 U. S. 157, 30 Sup. Ct. 463, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907; U. S. v. Congress Construction Co., 222 U. S. 199, 32 Sup. Ct. 44, 56 L. Ed. 163. *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. §§ 1011–1021.*

[17] Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682; Commercial Mut. Acc. Co. v. Davis, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782. *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. §§ 1011–1021.*

[18] The Paquete Habana, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320. *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. § 999.*

(c) *Some Criminal Causes*

The pressure of business upon the court has resulted in but little criminal jurisdiction being left it. The most notable class is of the questions arising under the act of March 2, 1907, which is as follows:

"Be it enacted, etc., that a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

"From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

"From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

"The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance:

"Provided, that no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant." [19]

This act was not repealed by the Judicial Code.[20]

[19] 34 Stat. 1246, c. 2564.

[20] United States v. Winslow, 227 U. S. 202, 33 Sup. Ct. 253, 57 L. Ed. —. *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. §§ 1022–1031.*

This allowance of a right of review to the United States marks a sharp change of policy, but it certainly guards the rights of the accused in every way possible. Under it a number of cases have been taken to the Supreme Court.[21]

Another instance of criminal review still left to the Supreme Court is in cases of obstructions to navigation by bridges.

Under the eighteenth section of the act of March 3, 1899, in relation to rivers and harbors, power is given to the Secretary of War, acting through the district attorney, to institute criminal proceedings against parties constructing bridges in such a way as to constitute an unreasonable obstruction to free navigation. It makes such act on the part of the person so obstructing the navigation a misdemeanor punishable by fine, if he does not remove the obstruction within a certain time after notice. If provides that an appeal from any case arising under the provisions of this section may be taken direct to the Supreme Court, either by the United States or by the defendants.[22]

(d) Constitutional or Treaty Questions

The section requires a direct resort to the Supreme Court "in any case that involves the construction or application of the Constitution of the United States."

"In any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question.

[21] See, as illustrations, U. S. v. Keitel, 211 U. S. 370, 29 Sup. Ct. 123, 53 L. Ed. 230; U. S. v. Biggs, 211 U. S. 507, 29 Sup. Ct. 181, 53 L. Ed. 305; U. S. v. Stevenson, 215 U. S. 190, 30 Sup. Ct. 35, 54 L. Ed. 153; U. S. v. Corbett, 215 U. S. 233, 30 Sup. Ct. 81, 54 L. Ed. 173; U. S. v. Barber, 219 U. S. 72, 31 Sup. Ct. 209, 55 L. Ed. 99. *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. §§ 1022–1031.*

[22] 30 Stat. 1153, c. 425 (U. S. Comp. St. 1901, p. 3545). See, as illustrations of such appeals, Union Bridge Co. v. U. S., 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; Monongahela Bridge Co. v. U. S., 216 U. S. 177, 30 Sup. Ct. 356, 54 L. Ed. 435; Hannibal Bridge Co. v. U. S., 221 U. S. 194, 31 Sup. Ct. 603, 55 L. Ed. 699. *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. § 1000.*

"In any case in which the Constitution or law of the state is claimed to be in contravention of the Constitution of the United States."

There is a striking difference in the policy of the act between this class of cases and the class involving simply jurisdictional questions. In the latter, only the jurisdictional question is certified, but in these constitutional or international questions the whole case goes up, and not simply the constitutional or international question that may be involved.[23] If such a question was raised on allegations so false and fictitious as to practically amount to bad faith, or on propositions so bald as to be self-destructive, the court would not take jurisdiction;[24] but, if the question raised is bona fide and colorable, the court will consider the whole case, although it should, in making such decision, hold that the constitutional question on account of which the case was taken up was not sustainable. On this point the Supreme Court has expressed itself as follows:

"The argument by which it is sought to support the contention that a right to review the case by direct appeal does not exist not only disregards the letter of the statute, but is unsound in reason. It says that the right to the direct appeal can alone rest on the proposition 'that the Constitution or a law of the state of Texas conflicts with appellant's contract, and contravenes the federal Constitution—in other words, it must affirmatively appear upon the face of complainant's bill that there was involved in this case a federal question, the determination of which was essential to a correct decision of the case'; but the words of

[23] Chappell v. U. S., 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510; Field v. Barber Asphalt Paving Co., 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142. *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. §§ 1022–1026, 1031.*

[24] Goodrich v. Ferris, 214 U. S. 71, 29 Sup. Ct. 580, 53 L. Ed. 914; Missouri Pac. R. Co. v. Castle, 224 U. S. 541, 32 Sup. Ct. 606, 56 L. Ed. 875. *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. §§ 1022–1026, 1031.*

the statute which empower this court to review directly the action of the circuit court are that such power shall exist wherever it is claimed on the record that a law of a state is in contravention of the federal Constitution. Of course, the claim must be real and colorable, not fictitious and fraudulent. The contention here made, however, is not that the bill, without color of right, alleges that the state law and city ordinances violate the Constitution of the United States, but that such claim as alleged in the bill is legally unsound. The argument, then, in effect, is that the right to a direct appeal to this court does not exist where it is claimed that a state law violates the Constitution of the United States, unless the claim be well founded. But it cannot be decided whether the claim is meritorious and should be maintained without taking jurisdiction of the case. The authorities referred to as supporting the position indicate that the argument is a result of a confusion of thought, and that it arises from confounding the power of this court to review on a writ of error the action of a state court with the power exercised by this court under the act of 1891 to review by direct appeal the final action of the circuit court, where on the face of the record it appears that the claim was made that the statute of a state contravened the Constitution of the United States. These classes of jurisdiction are distinct in their nature, and are embraced in different statutory provisions. Having jurisdiction of the cause, there exists the power to consider every question arising on the record." [25]

In order to give jurisdiction in this class, it must clearly appear that the question was actually raised and passed on. It is not only necessary that a title, right, privilege, or immunity is claimed under the Constitution, where the appeal is based on the ground that the construction or ap-

[25] PENN MUT. LIFE INS. CO. v. AUSTIN, 168 U. S. 685, 694, 695, 18 Sup. Ct. 223, 42 L. Ed. 626. *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. §§ 1022–1026, 1031.*

plication of the Constitution is involved, but a definite issue in respect to the possession of the right must be distinctly deducible from the record. Hence, although the plaintiff stated in his complaint that he would rely upon certain treaty provisions and upon the fifth amendment to the federal Constitution, but there was nothing to show that the question actually arose in the case, the court declined to take jurisdiction.[26]

A general exception to an instruction, not stating that it was objected to on the ground that a constitutional question was involved, is not sufficient to make the record show such a question; and, as it must appear from the record of the court of original jurisdiction, an assignment of errors cannot be used for the purpose of grafting upon the record such a question for the first time.[27] On the other hand, the Supreme Court would have jurisdiction, although the question was raised for the first time by the defendant's pleading, as by demurrer; the principle being different in this case from the rule that the original jurisdiction of a federal court, as based on a federal question, must appear from the plaintiff's statement of his own case, as has been discussed in a previous connection.[28]

It makes no difference which of the two parties appeals. The court has jurisdiction in either case, if such a question is involved. For instance, in Loeb v. Columbia Tp.[29] the federal question was raised by the defendant's demurrer and decided in his favor, and the plaintiff was the appellant. On the other hand, in Connolly v. Union Sewer Pipe

[26] Muse v. Arlington Hotel Co., 168 U. S. 430, 18 Sup. Ct. 109, 42 L. Ed. 531. *See "Courts," Dec. Dig. (Key-No.) §§ 298, 385.*

[27] Cincinnati, H. & D. R. Co. v. Thiebaud, 177 U. S. 615, 20 Sup. Ct. 822, 44 L. Ed. 911. *See "Courts," Dec. Dig. (Key-No.) § 385; Cent. Dig. §§ 1022–1026, 1031.*

[28] Loeb v. Township, 179 U. S. 472, 21 Sup. Ct. 174, 45 L. Ed. 280; ante, pp. 236, 312. *See "Courts," Dec. Dig. (Key-No.) § 385.*

[29] 179 U. S. 472, 21 Sup. Ct. 174, 45 L. Ed. 280. *See "Courts," Dec. Dig. (Key-No.) § 385.*

Co.[30] the constitutional question was raised by the plaintiff, sustained by the court, and appealed by defendant. In both cases the court held that it had jurisdiction.[31]

CASES INCLUDED IN THIS CLASS

(1) *"In Any Case That Involves the Construction or Application of the Constitution of the United States"*

In order to give jurisdiction under this heading, the constitutional question must be directly involved, and must be a controlling question in the case.[32]

Notwithstanding the broad language of this statute, it was not intended to change the long-established principle of criminal law that no appeal lies on behalf of the government. Hence in criminal cases the United States cannot appeal, except under the act of March 2, 1907, just discussed, though a constitutional question is involved.[33] But the defendant can take any criminal case to the Supreme Court that involves a constitutional question.[34]

Mere irregularities in judicial proceedings which can be corrected by review are not considered constitutional questions. For instance, the allegation that a decree of court deprived the plaintiff of his property without due process of law is not such a question.[35] So the allegation that the action of the court in directing a verdict deprived the liti-

[30] 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679. *See "Courts," Dec. Dig. (Key-No.) § 385.*

[31] See, also, Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 24 Sup. Ct. 489, 48 L. Ed. 749. *See "Courts," Dec. Dig. (Key-No.) § 385.*

[32] Carey v. Houston & T. C. Ry. Co., 150 U. S. 170, 14 Sup. Ct. 63, 37 L. Ed. 1041. *See "Courts," Dec. Dig. (Key-No.) § 385.*

[33] U. S. v. Sanges, 144 U. S. 310, 12 Sup. Ct. 609, 36 L. Ed. 445. *See "Courts," Dec. Dig. (Key-No.) § 385; "Criminal Law," Dec. Dig. (Key-No.) § 1024; Cent. Dig. §§ 2599–2614.*

[34] MOTES v. U. S., 178 U. S. 458, 20 Sup. Ct. 993, 44 L. Ed. 1150. *See "Courts," Dec. Dig. (Key-No.) § 385.*

[35] Carey v. Houston & T. C. Ry. Co., 150 U. S. 170, 14 Sup. Ct. 63, 37 L. Ed. 1041. *See "Courts," Dec. Dig. (Key-No.) § 385.*

gant of the right of trial by jury is not a constitutional question.[36]

So the question whether process was served on a state agent of a foreign corporation in accordance with the state statute regulating it was not a constitutional question.[37] So, too, the question whether parties were collusively joined for the purpose of conferring jurisdiction on a federal court.[38] On the other hand, a constitutional question was held to be involved when a collector of internal revenue refused to file in a state court copies of papers in his office which he was forbidden by federal regulations to divulge, in consequence of which he was committed for contempt by the state court, and a proceeding by habeas corpus was based thereon.[39] So, too, a constitutional question was involved when the trial court admitted, against the prisoner's objection, the written testimony that a witness had given at the examining trial; the allegation being that this deprived the accused of the constitutional right of being confronted with the witnesses against him.[40]

The right to vote for members of Congress being a right claimed under the federal Constitution, a suit against the state election officers for refusing a vote involves a constitutional question.[41]

The right to build a dock in navigable waters, which was

[36] C. A. Treat Mfg. Co. v. Standard Steel & Iron Co., 157 U. S. 674, 15 Sup. Ct. 718, 39 L. Ed. 853. *See "Courts," Dec. Dig. (Key-No.) § 385.*

[37] Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 24 Sup. Ct. 489, 48 L. Ed. 749. *See "Courts," Dec. Dig. (Key-No.) § 385.*

[38] Merritt v. Bowdoin College, 169 U. S. 551, 18 Sup. Ct. 415, 42 L. Ed. 850. *See "Courts," Dec. Dig. (Key-No.) § 385.*

[39] Boske v. Comingore, 177 U. S. 459, 20 Sup. Ct. 701, 44 L. Ed. 846. As another example of a habeas corpus appeal, see Pierce v. Creecy, 210 U. S. 387, 28 Sup. Ct. 714, 52 L. Ed. 1113. *See "Courts," Dec. Dig. (Key-No.) § 385.*

[40] MOTES v. U. S., 178 U. S. 458, 20 Sup. Ct. 993, 44 L. Ed. 1150. *See "Courts," Dec. Dig. (Key-No.) § 385.*

[41] Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84. *See "Courts," Dec. Dig. (Key-No.) § 385.*

claimed under certain acts of Congress and a permit from the Secretary of War, and which was disputed, involves a constitutional question.[42]

(2) *"In Any Case in Which the Constitutionality of Any Law of the United States * * * is Drawn in Question"*

This class of jurisdiction in the Supreme Court only applies where the constitutionality of the federal statute is questioned. A mere question of construction under a federal statute does not come within this class.[43] Hence there are many federal questions of which the federal trial courts have jurisdiction, but which do not fall within this class—such as questions involving the mere construction of a federal statute, and not its validity. Such cases cannot go by direct appeal from the courts of original jurisdiction to the Supreme Court, but it will be seen, in discussing the jurisdiction of the Supreme Court over cases from the circuit courts of appeals, that the decision of the circuit courts of appeals is not final in such cases, and that, therefore, if they involve a sufficient amount, they can be taken to the Supreme Court from that court. But wherever the validity of a federal statute is questioned, the appeal lies directly to the Supreme Court.[44]

(3) *"In Any Case in Which * * * the Validity or Construction of Any Treaty Made under Its Authority is Drawn in Question"*

Here, too, it must appear that the validity or construction of a treaty was actually involved or passed upon.[45]

[42] Cummings v. Chicago, 188 U. S. 410, 23 Sup. Ct. 472, 47 L. Ed. 525. *See "Courts," Dec. Dig. (Key-No.) § 385.*

[43] Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 24 Sup. Ct. 376, 48 L. Ed. 496. *See "Courts," Dec. Dig. (Key-No.) § 385.*

[44] Horner v. U. S., 143 U. S. 570, 12 Sup. Ct. 522, 36 L. Ed. 266 (involving the constitutionality of section 3894 of the Revised Statutes [U. S. Comp. St. 1901, p. 2659] forbidding the use of the mails for lotteries); CHAPPELL v. U. S., 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510 (involving the validity of a federal condemnation act). *See "Courts," Dec. Dig. (Key-No.) § 385.*

[45] Muse v. Arlington Hotel Co., 168 U. S. 430, 18 Sup. Ct. 109, 42

Where a treaty comes before the court only in an incidental way, as part of the history of a case, or as relevant to some main issue involved, this is not sufficient to confer jurisdiction on the Supreme Court under this section.[46] But where the construction of the treaty is necessary for the decision, although it may be connected with other questions in the case, the Supreme Court has jurisdiction.[47]

(4) *"In Any Case in Which the Constitution or Law of a State is Claimed to be in Contravention of the Constitution of the United States"*

It has always been the policy of Congress to make the Supreme Court the final arbiter of questions of this character, it being the only class in which an appeal lies from a state court to a federal court, as will be seen hereafter.

But such right to review the inferior federal courts of original jurisdiction by the Supreme Court can be invoked only by the party actually affected. For instance, a city cannot set up that an act extending boundaries deprives residents of the outlying territory of their property without due process when the parties themselves have made no complaint.[48] And the Supreme Court has the right to review the entire case under this section, though the lower court has certified a question up as a jurisdictional question, for it is not in the power of the lower court to narrow the jurisdiction of the Supreme Court by such a certificate.[49]

L. Ed. 531; Altman & Co. v. U. S., 224 U. S. 583, 32 Sup. Ct. 593, 56 L. Ed. 894. *See "Courts," Dec. Dig. (Key-No.) §§ 298, 385.*

[46] Borgmeyer v. Idler, 159 U. S. 408, 16 Sup. Ct. 34, 40 L. Ed. 199; Sloan v. U. S., 193 U. S. 614, 24 Sup. Ct. 570, 48 L. Ed. 814; The Pilot v. United States, 53 Fed. 11, 3 C. C. A. 392. *See "Courts," Dec. Dig. (Key-No.) § 385.*

[47] Rice v. Ames, 180 U. S. 371, 21 Sup. Ct. 406, 45 L. Ed. 577; Mitchell v. Furman, 180 U. S. 402, 21 Sup. Ct. 430, 45 L. Ed. 596; Pettit v. Walshe, 194 U. S. 205, 24 Sup. Ct. 658, 48 L. Ed. 938. *See "Courts," Dec. Dig. (Key-No.) § 385.*

[48] Lampasas v. Bell, 180 U. S. 276, 21 Sup. Ct. 368, 45 L. Ed. 527. *See "Courts," Dec. Dig. (Key-No.) § 385.*

[49] Giles v. Harris, 189 U. S. 475, 23 Sup. Ct. 639, 47 L. Ed. 909. *See "Courts," Dec. Dig. (Key-No.) § 385.*

One of the most numerous classes of cases involving the validity of state legislation is where such legislation is claimed to impair the obligation of a contract.[50] The question whether state legislation denies the equal protection of the laws has also been the subject of many such cases.[51] The language of all these subdivisions to section 238 clearly gives an appeal to the Supreme Court only from such proceedings in court as would constitute a case, and not from proceedings of a mere administrative character which happen to be vested in a district court.[52] And in all these cases the Supreme Court has jurisdiction regardless of the amount involved.[53]

(e) Suits by the United States under the Anti-Trust Acts

The act of February 11, 1903,[54] provides in its second section that any suit in equity brought under the anti-trust acts wherein the United States is complainant, may be taken direct to the Supreme Court.[55]

[50] PENN MUT. LIFE INS. CO. v. AUSTIN, 168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. 626; Illinois Cent. R. Co. v. Adams, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410. *See "Courts," Dec. Dig. (Key-No.) § 385.*

[51] Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; Fidelity Mut. Life Ass'n v. Mettler, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922. *See "Courts," Dec. Dig. (Key-No.) § 385.*

[52] PACIFIC STEAM WHALING CO. v. U. S., 187 U. S. 447, 23 Sup. Ct. 154, 47 L. Ed. 253. *See "Courts," Dec. Dig. (Key-No.) § 385.*

[53] Kirby v. American Soda Fountain Co., 194 U. S. 141, 24 Sup. Ct. 619, 48 L. Ed. 911. *See "Courts," Dec. Dig. (Key-No.) § 385.*

[54] 32 Stat. 823, c. 544, amended by Act June 25, 1910, c. 428, 36 Stat. 854 (U. S. Comp. St. Supp. 1911, p. 1383).

[55] NORTHERN SECURITIES CO. v. U. S., 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679; Interstate Commerce Commission v. Baird, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860; Baltimore & O. R. Co. v. Interstate Commerce Commission, 215 U. S. 216, 30 Sup. Ct. 86, 54 L. Ed. 164. *See "Courts," Dec. Dig. (Key-No.) § 385; "Monopolies," Dec. Dig. (Key-No.) § 24.*

APPEALS FROM THE CIRCUIT COURTS OF APPEALS

181. The Supreme Court exercises appellate jurisdiction over the circuit court of appeals:

(a) By certificate from the circuit court of appeals when the judges of that court desire to certify a question to the Supreme Court for its decision.

(b) By writ of certiorari from the Supreme Court to the circuit court of appeals when the judges of the Supreme Court desire to review in the highest court the decision of some question of great importance.

(c) By appeal or writ of error in all cases in which the decision of the circuit court of appeals is not final.

(d) In certain cases under the bankrupt act.

Section 239 of the Judicial Code provides:

"In any case within its appellate jurisdiction, as defined in section one hundred and twenty-eight, the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision; and thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal."

(*a*) *Review on Certificate*

Under this paragraph, the first method in which the Supreme Court can acquire jurisdiction to review cases in the circuit courts of appeals is by a certificate from the latter

court, the object of which is to present to the Supreme Court definite propositions of law.

There is some ambiguity whether this certificate can be issued in any case of which the circuit court of appeals has jurisdiction, or only in those cases of which it has final jurisdiction. The more natural construction of the words "in every such subject within its appellate jurisdiction," which precede the provision as to the certificate, would seem, however, to be that they allude to the appellate jurisdiction to review by appeal or writ of error all the decisions of the district courts except those provided for by section 238 of the Judicial Code, and that the words above quoted qualify this first part of the section, and not simply the part immediately preceding them, which specify the cases of final jurisdiction. The object of the certificate will apply to both alike, and it is not only more natural to suppose that the circuit courts of appeals could certify questions up from all cases in its jurisdiction than to suppose that they were limited; but this view is also strengthened by the fact that, in the subsequent paragraph relating to the right of the Supreme Court to issue a certiorari, that is expressly limited to cases made final, thus drawing a distinction between the cases going up by a certificate and cases brought up by certiorari.

The object of this provision and its limits are well expressed in an opinion of Mr. Justice Brewer:

"It may be proper to observe that the purpose of the act of 1891 creating the courts of appeals, was to vest final jurisdiction as to certain classes of cases in the courts then created; and this in order that the docket of this court might be relieved, and it be enabled with more promptness to dispose of the cases directly coming to it. In order to guard against any injurious results which might flow from having nine appellate courts acting independently of each other, power was given to this court to bring before it by certiorari any case pending in either of those courts. In

that way it was believed that uniformity of ruling might be secured, as well as the disposition of cases whose gravity and importance rendered the action of the tribunal of last resort peculiarly desirable, but the power of determining what cases should be so brought up was vested in this court, and it was not intended to give to any one of the courts of appeals the right to avoid the responsibility cast upon it by statute by transmitting any case it saw fit to this court for decision. If such practice were tolerated, it is easy to perceive that the purpose of the act might be defeated, and the courts of appeals, by transferring cases here, not only relieve themselves of burden, but also crowd upon this court the very cases which it was the intent of Congress they should finally determine. It is true, power was given to the courts of appeals to certify questions, but it is only 'questions or propositions of law' which they are authorized to certify. And such questions must be, as held in the case just cited, 'distinct questions or propositions of law, unmixed with questions of fact, or of mixed law and fact.' It is not always easy to draw the line, for, in order to present a distinct question of law, it may sometimes be necessary to present many facts upon which that question is based; but care must always be taken that, under the guise of certifying questions, the courts of appeals do not transmit the whole case to us for consideration."[56]

The form of this certificate is prescribed by rule 37[57] of the United States Supreme Court, as follows:

"Where, under section 239 of the act entitled 'An act to codify, revise, and amend the laws relating to the judiciary,' approved March 3, 1911, chapter 231, a circuit court of appeals shall certify to this court a question or proposition of law concerning which it desires the instruction of this

[56] WARNER v. NEW ORLEANS, 167 U. S. 474, 475, 17 Sup. Ct. 892, 42 L. Ed. 239. *See "Courts," Dec. Dig. (Key-No.) § 384; Cent. Dig. § 1021.*

[57] 32 Sup. Ct. xiv.

court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises."

The Supreme Court has repeatedly held that this certificate should present separate, independent propositions of law, and show that the court desired instruction upon such questions, and that it could not be used for certifying up questions involving an examination of the entire record, although the Supreme Court may, if it desires, require the whole record to be sent up, but that must be the act of the Supreme Court, not of the circuit court of appeals.[58]

The Supreme Court has also said that a good analogy to follow in the framework of these certificates is the old certificate of division of opinion, in use before these more recent provisions regulating appeals.[59]

The issuing of this certificate is discretionary with the circuit court of appeals, and it should issue only before a decision in the case, and when the court entertains a real doubt.[60]

The facts to be embodied in such a certificate are not mere matters of evidence, but the ultimate facts necessary for a right understanding of the question involved.[61] The cases referred to in the footnote to this sentence contain forms of such certificate.[62]

[58] Cincinnati, H. & D. R. Co. v. McKeen, 149 U. S. 259, 13 Sup. Ct. 840, 37 L. Ed. 725; Hallowell v. U. S., 209 U. S. 101, 28 Sup. Ct. 498, 52 L. Ed. 702. *See "Courts," Dec. Dig. (Key-No.) § 384; Cent. Dig. § 1021.*

[59] Graver v. Faurot, 162 U. S. 435, 16 Sup. Ct. 799, 40 L. Ed. 1030; Felsenheld v. U. S., 186 U. S. 126, 22 Sup. Ct. 740, 46 L. Ed. 1085. *See "Courts," Dec. Dig. (Key-No.) §§ 384, 386; Cent. Dig. §§ 1021, 1027–1030.*

[60] Louisville, N. A. & C. R. Co. v. Pope, 74 Fed. 1, 20 C. C. A. 253; German Ins. Co. v. Hearne, 118 Fed. 134, 55 C. C. A. 84; Cella v. Brown, 144 Fed. 742, 75 C. C. A. 608. *See "Courts," Dec. Dig. (Key-No.) § 384; Cent. Dig. § 1021.*

[61] Sigafus v. Porter, 85 Fed. 689, 29 C. C. A. 391. *See "Courts," Dec. Dig. (Key-No.) § 384; Cent. Dig. § 1021.*

[62] New Orleans v. Benjamin, 153 U. S. 411, 14 Sup. Ct. 905, 38 L. Ed. 764; Folsom v. U. S., 160 U. S. 121, 16 Sup. Ct. 222, 40 L. Ed.

(*b*) *Review by Certiorari*

Section 240 of the Judicial Code provides as follows:

"In any case, civil or criminal, in which the judgment or decree of the circuit court of appeals is made final by the provisions of this title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

The Supreme Court can issue a certiorari to the circuit court of appeals only in the cases "hereinbefore made final"; that is, in the cases named in section 128 of the Judicial Code as final. This power of the Supreme Court is intended for use only in exceptional circumstances. It has been issued only in questions of gravity and general importance, or in cases where it was necessary to settle a conflict of decision between inferior courts.[63] It has been issued in several admiralty cases involving questions arising out of the international rules of navigation, and in questions arising out of treaties, on account of the international character of these questions. It has been refused, however, on questions of mere local law—as, for instance, the question whether the law of master and servant was properly applied in a particular case.[64] It may be issued before a final decree in the circuit court of appeals, if the case is an exceptional one, but it is issued in such cases with great

363; U. S. v. Harsha, 172 U. S. 567, 19 Sup. Ct. 294, 43 L. Ed. 556; Cincinnati, H. & D. R. Co. v. Thiebaud, 177 U. S. 615, 20 Sup. Ct. 822, 44 L. Ed. 911. *See "Courts," Dec. Dig. (Key-No.) § 384; Cent. Dig. § 1021.*

[63] Ex parte Lau Ow Bew, 141 U. S. 583, 12 Sup. Ct. 43, 35 L. Ed. 868; Columbus Watch Co. v. Robbins, 148 U. S. 266, 13 Sup. Ct. 594, 37 L. Ed. 445; FORSYTH v. HAMMOND, 166 U. S. 506, 17 Sup Ct. 665, 41 L. Ed. 1095. *See "Courts," Dec. Dig. (Key-No.) § 383.*

[64] In re Woods, 143 U. S. 202, 12 Sup. Ct. 417, 36 L. Ed. 125. *See "Courts," Dec. Dig. (Key-No.) § 383.*

reluctance.[65] It will not be issued in a case where the circuit court of appeals itself had no jurisdiction.[66]

If issued on the ground that an important question is involved, and it turns out that such is not the case, the Supreme Court will dismiss the proceeding without considering the merits.[67]

As the statute provides that such a case, when certified, goes to the Supreme Court, with the same power and authority in the case as if it had been carried by appeal or writ of error, it follows that only errors complained of by the petitioner can be considered by the Supreme Court, and that the party who has applied for the writ cannot complain of any errors against him.[68]

When issued to a circuit court of appeals, after a second appeal to the circuit court of appeals from the trial court, it brings up the entire case.[69] No limitation is expressly provided for the time when this writ may issue, but it has been held that the court will apply the limitation of one year to direct appeals from the circuit court of appeals by analogy, and the writ will issue though the circuit court of appeals has already sent its mandate down to the lower court.[70]

[65] American Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 385, 13 Sup. Ct. 158, 37 L. Ed. 486; FORSYTH v. HAMMOND, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095. *See "Courts," Dec. Dig. (Key-No.) § 383.*

[66] Good Shot v. U. S., 179 U. S. 87, 21 Sup. Ct. 33, 45 L. Ed. 101. *See "Courts," Dec. Dig. (Key-No.) § 383.*

[67] U. S. v. Rimer, 220 U. S. 547, 31 Sup. Ct. 596, 55 L. Ed. 578. *See "Courts," Dec. Dig. (Key-No.) § 383.*

[68] Hubbard v. Tod, 171 U. S. 474, 19 Sup. Ct. 14, 43 L. Ed. 246. *See "Courts," Dec. Dig. (Key-No.) § 383.*

[69] Panama R. Co. v. Napier Shipping Co., 166 U. S. 280, 17 Sup. Ct. 572, 41 L. Ed. 1004. *See "Courts," Dec. Dig. (Key-No.) § 383.*

[70] The Conqueror, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937. This was decided before the enactment of the Judicial Code, which omits this one-year limitation. But there is no danger that the Supreme Court will grant belated applications for the writ. Ayres v. Polsdorfer, 187 U. S. 585, 23 Sup. Ct. 196, 47 L. Ed. 314; Bonin v.

It is an interesting question whether the Supreme Court can issue the writ in any case of which the court of appeals has jurisdiction, and there is some general language in two of its decisions implying that its power to issue the writ is practically coextensive with the appellate jurisdiction of the circuit court of appeals.[71] But the language of the paragraph conferring the right to issue the writ seems very clearly to limit it to those cases "hereinbefore made final"; that is, to cases depending on diverse citizenship, or arising under the patent laws, the copyright laws, the revenue laws, or the criminal laws, and in admiralty cases. Hence important questions pending in a lower court may be out of the reach of the Supreme Court entirely. If they are not included in the class of cases "hereinbefore made final," and involve less than a thousand dollars, they cannot be reached by a certiorari, and they cannot be taken from the circuit court of appeals by direct appeal. If they do not involve any of the questions mentioned in section 238, they could not be taken to the Supreme Court direct from the courts of original jurisdiction. For instance, a civil suit by the United States for an amount less than a thousand dollars would seem to be beyond the reach of the Supreme Court, no matter how important the construction of the statute might be on which the right of recovery would hinge.

The refusal of the writ does not imply an affirmance.[72]

(c) *By Appeal or Writ of Error*

Section 241 of the Judicial Code reads:

"In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of

Gulf Co., 198 U. S. 115, 25 Sup. Ct. 608, 49 L. Ed. 970. *See "Courts," Dec. Dig. (Key-No.) § 383.*

[71] Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340; FORSYTH v. HAMMOND, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095. *See "Courts," Dec. Dig. (Key-No.) § 383.*

[72] Anderson v. Moyer (D. C.) 193 Fed. 499. *See "Courts," Dec. Dig. (Key-No.) § 383.*

this title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs."

The question what cases are final, and what are not, has been touched upon in the previous chapter, in connection with the jurisdiction of the circuit court of appeals.

The rules regulating the course of appeal in this class of questions are summarized in a recent decision of the Supreme Court to the effect that the decision of the circuit court of appeals is final if the jurisdiction of the trial court was first invoked on the ground of diverse citizenship. If, on the other hand, the jurisdiction was first invoked on the ground of diverse citizenship, and a constitutional question subsequently arises, the case can go either to the circuit court of appeals or to the Supreme Court, but not to both. If the jurisdiction of the trial court was invoked both on the ground of diverse citizenship and a federal question (not necessarily a constitutional question), then the jurisdiction of the circuit court of appeals is not final.[73] On the other hand, a decree on a petition of intervention in an equity suit against a receiver for personal injuries is reviewable by the circuit court of appeals where the jurisdiction in the main suit depended on diverse citizenship, but, if an independent common-law suit had been brought against the receiver, then it would not be final, as the jurisdiction in such case would not be based on diverse citizenship.[74] So, too, where the jurisdiction was invoked on

[73] HUGULEY MFG. CO. v. GALETON COTTON MILLS, 184 U. S. 290, 22 Sup. Ct. 452, 46 L. Ed. 546. See, also, Henningsen v. U. S. Fidelity & Guaranty Co., 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547; Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 220 U. S. 446, 31 Sup. Ct. 456, 55 L. Ed. 536; Louisville & N. R. Co. v. F. W. Cook Brewing Co., 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355, ante, p. 521. *See "Courts," Dec. Dig. (Key-No.) § 382; Cent. Dig. § 1020.*

[74] Rouse v. Hornsby, 161 U. S. 588, 16 Sup. Ct. 610, 40 L. Ed. 817; Shulthis v. McDougal, 225 U. S. 561, 32 Sup. Ct. 704, 56 L. Ed. 1205. *See "Courts," Dec. Dig. (Key-No.) § 382; Cent. Dig. § 1020.*

the ground of diverse citizenship, but the case was dismissed because the suit was by an assignee in a case where his assignor could not have sued, the decision of the circuit court of appeals was final, for it depended in the first instance on diverse citizenship, though it did not come within a well-recognized exception.[75]

Where a suit originally depended on diverse citizenship, a federal question is not raised by the charge that a state officer erroneously construed a state law so as to deprive complainants of their property without due process of law, and to deny them the equal protection of the laws, for the act complained of in such case is not the state law itself, but the erroneous action of an officer under it.[76]

A suit against a railway for loss of a registered package from the mails by negligence raises no federal question, and, if the trial court acquire jurisdiction by reason of diverse citizenship, the appeal would go to the circuit court of appeals alone.[77] On the other hand, a suit against a corporation claiming its charter by act of Congress involves a federal question, and hence the decision of the circuit court of appeals is not final.[78] So, too, a suit against a marshal for a wrongful attachment raises a federal question, as it involves his official acts, and the decision of the circuit court of appeals is not final.[79] So a suit on a clerk's

[75] Benjamin v. New Orleans, 169 U. S. 161, 18 Sup. Ct. 298, 42 L. Ed. 700. *See "Courts," Dec. Dig. (Key-No.) § 382; Cent. Dig. § 1020.*

[76] Arbuckle v. Blackburn, 191 U. S. 405, 24 Sup. Ct. 148, 48 L. Ed. 239. *See "Courts," Dec. Dig. (Key-No.) § 382.*

[77] Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 192 U. S. 371, 24 Sup. Ct. 325, 48 L. Ed. 484. *See "Courts," Dec. Dig. (Key-No.) § 382; Cent. Dig. §§ 1011–1020.*

[78] Northern Pac. R. Co. v. Amato, 144 U. S. 465, 12 Sup. Ct. 740, 36 L. Ed. 506; Union Pac. R. Co. v. Harris, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. Ed. 1003; Texas & P. R. Co. v. Howell, 224 U. S. 577, 32 Sup. Ct. 601, 56 L. Ed. 892, ante, pp. 237, 489. *See "Courts," Dec. Dig. (Key-No.) § 382; Cent. Dig. §§ 1011–1020.*

[79] Sonnentheil v. Christian Moerlein Brewing Co., 172 U. S. 401, 19 Sup. Ct. 233, 43 L. Ed. 492. *See "Courts," Dec. Dig. (Key-No.) § 382; Cent. Dig. §§ 1011–1020.*

bond for money paid into court, and not accounted for by him, involving the right of litigants to proceed on such bond.[80] So a suit against a receiver of a national bank, for he is an officer of the United States.[81] So a suit by a foreign state.[82] So a suit in which the ground of jurisdiction was not only diverse citizenship, but an alleged infringement of a trade-mark, for the jurisdiction in such case does not "depend entirely" upon diverse citizenship.[83]

(d) Appeals under the Bankrupt Act

Section 252 of the Judicial Code provides:

"The Supreme Court of the United States is hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings, from the courts of bankruptcy, from which it has appellate jurisdiction in other cases; and shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

"An appeal may be taken to the Supreme Court of the United States from any final decision of a court of appeals allowing or rejecting a claim under the laws relating to bankruptcy, under such rules and within such time as may

[80] Howard v. U. S., Use of Stewart, 184 U. S. 676, 22 Sup. Ct. 543, 46 L. Ed. 754. *See "Courts," Dec. Dig. (Key-No.) § 382; Cent. Dig. §§ 1011–1020.*

[81] Auten v. United States Nat. Bank, 174 U. S. 125, 19 Sup. Ct. 628, 43 L. Ed. 920. *See "Courts," Dec. Dig. (Key-No.) § 382; Cent. Dig. §§ 1011–1020.*

[82] Colombia v. Cauca Co., 190 U. S. 524, 23 Sup. Ct. 704, 47 L. Ed. 1159. *See "Courts," Dec. Dig. (Key-No.) § 382; Cent. Dig. §§ 1011–1020.*

[83] Warner v. Searle & Hereth Co., 191 U. S. 195, 24 Sup. Ct. 79, 48 L. Ed. 145. Since the above decision the act of February 20, 1905, makes the decision of the circuit court of appeals final in suits for infringement of trade-marks. Hutchinson Pierce & Co. v. Loewy, 217 U. S. 457, 30 Sup. Ct. 613, 54 L. Ed. 838. But the act does not apply where other questions than mere infringement are involved, such as the issue of unfair competition. Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 220 U. S. 446, 31 Sup. Ct. 456, 55 L. Ed. 536. *See "Courts," Dec. Dig. (Key-No.) § 382; Cent. Dig. §§ 1011–1020.*

be prescribed by said Supreme Court, in the following cases and no other:

"First. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States; or

"Second. Where some justice of the Supreme Court shall certify that in his opinion the determination of the question involved in the allowance or rejection of such claim is essential to a uniform construction of the laws relating to bankruptcy throughout the United States.

"Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof, and may issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted." [84]

Where an order had been made postponing a claim to another, from which no appeal was taken, the question whether this order was properly construed by the referee and court in carrying out their duties of administration was not one from which an appeal would lie.[85] The only appeal from an order refusing a discharge is to the circuit court of appeals. Its action cannot be reviewed by the Supreme Court.[86]

[84] HOLDEN v. STRATTON, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 448, 453; Cent. Dig. § 914.*

[85] Wynkoop-Hallenbeck-Crawford Co. v. Gaines, 227 U. S. 4, 33 Sup. Ct. 214, 57 L. Ed. ——. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 448, 453.*

[86] James v. Stone & Co., 227 U. S. 410, 33 Sup. Ct. 351, 57 L. Ed. ——. *See "Bankruptcy," Dec. Dig. (Key-No.) §§ 448, 453; Cent. Dig. § 914.*

APPEALS FROM COURTS OF THE TERRITORIES OR DEPENDENCIES

182. A limited class of cases may be taken to the Supreme Court from certain courts of Porto Rico, Hawaii, Alaska and the Philippines.

As all the territories comprised within the borders of the United States proper are now states, the enactments as to territorial courts lose their importance. But there are special provisions as to the dependencies.

As to Porto Rico, section 244 of the Judicial Code allows a review in the Supreme Court of copyright, constitutional or treaty questions or claims of authority under acts of Congress, without regard to the sum or value of the matter in dispute, and in all other cases involving more than five thousand dollars.

As to Hawaii, section 246 of the Judicial Code allows a right of review of its supreme court in the same class of cases in which the Supreme Court of the United States would have a right of review of the decisions of a state court, and also in cases involving over five thousand dollars.

As to Alaska, section 247 of the Judicial Code gives a right of review to the Supreme Court in prize cases, constitutional questions, or treaty questions.

As to the Philippines, section 248 of the Judicial Code gives a right of review to the Supreme Court of constitutional questions, questions involving any statute, treaty, title, right, or privilege of the United States, and also cases involving over twenty-five thousand dollars in amount, or land suits involving over that sum in value.[87]

[87] Harty v. Municipality of Victoria, 226 U. S. 12, 33 Sup. Ct. 4, 57 L. Ed. ——. *See "Courts," Dec. Dig. (Key-No.) § 387.*

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

183. The Supreme Court has jurisdiction to review decisions of the court of appeals of the District of Columbia only in cases involving constitutional, international, or constructional questions, but may bring up other cases by certiorari.

The appellate jurisdiction of the Supreme Court over the court of appeals of the District of Columbia is regulated by sections 250 and 251 of the Judicial Code. The first of these sections is based on the idea of giving a review only of the class of questions which could be brought up from inferior courts of the states or of the United States. The first four classes named are the same as those named in section 238 providing for a review of the decisions of the district courts. The fifth adds cases of federal questions arising in the state courts which might be taken to the Supreme Court as provided in section 237 of the Judicial Code. And the sixth and last gives a right of review where the construction of any law of the United States is drawn in question by the defendant. All other decisions are final, except that under section 251 the Supreme Court may issue a certiorari to bring up any decision in such case. This section also allows the court of appeals of the District to certify questions of law up to the Supreme Court; and section 250 requires only the question of jurisdiction to be certified up when the appeal is claimed on that ground.

These provisions radically change the pre-existing law, and assimilate appeals in the District to those in the states.

APPEALS FROM THE COURT OF CLAIMS

184. Under section 242 of the Judicial Code, judgments against the United States in any case in which the amount in controversy exceeds three thousand dollars, and judgments forfeiting a plaintiff's claim for fraud under the provisions of section 172 of the Judicial Code are reviewable by the Supreme Court.

APPEALS FROM THE COMMERCE COURT

185. Under section 210 of the Judicial Code, appeals from the commerce court lie to the Supreme Court under rigid provisions as to promptness and as to superseding the judgment appealed from.*

REVIEW OF STATE COURT DECISIONS

186. In order to insure the proper administration of federal laws, the Supreme Court is given jurisdiction to review by writ of error the final decisions of the state court which is the court of last resort in the special instance, in cases involving any question of conflict between state and federal laws or authority, where such decision is against the federal law or authority; that is, in cases involving constitutional questions as to the relative boundaries of state and federal rights.

The right to review decisions of state courts is given by section 237 of the Judicial Code, which reads as follows:

"A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or

* Repealed by the act of October 22, 1913, post, p. 701.

statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

"The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ."

This is the famous twenty-fifth section of the judiciary act of 1789. Its validity and policy were not sustained without contest.

SAME—CONSTITUTIONALITY

187. The right of Congress to give a review to the Supreme Court of decisions of the state courts on federal questions, though once vigorously contested, is settled by decisions.

After exercising this right of review without question in several cases, it was vigorously denied by the supreme court of appeals of Virginia. In a case where its decision was reversed, and where the United States Supreme Court

sent down the mandate directing them to enter judgment in accordance with the views of the federal court, the Virginia court refused to obey the mandate, and entered upon its records an order reciting that it did so because it did not consider that the Constitution authorized Congress to give a right of review of the decisions of the state courts.[88] Thereupon the Supreme Court reviewed the grounds of the refusal of the Virginia court, and decided in favor of the constitutionality of the act.[89] The ground on which the Virginia court denied the validity of the act was that the federal Constitution, properly construed, only authorized the right of review of decisions of federal courts; that the description of the judicial power contained in the Constitution evidently only referred to the jurisdiction of the federal courts; that the states, in the powers reserved to them, were as supreme as the federal government in the powers delegated to it; that the two, therefore, were co-ordinate and the state courts not inferior, but co-ordinate, to the federal courts. This view, however, was contested, not only in the same case, but in subsequent decisions of the Supreme Court, and must be considered as settled.[90]

[88] Hunter v. Martin, 4 Munf. (18 Va.) 1. *See "Courts," Dec. Dig. (Key-No.) § 391; Cent. Dig. §§ 1045, 1092.*

[89] Martin v. Hunter, 1 Wheat. 304, 4 L. Ed. 97. *See "Courts," Dec. Dig. (Key-No.) § 391; Cent. Dig. §§ 1045, 1092.*

[90] Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257; WILLIAMS v. BRUFFY, 102 U. S. 248, 26 L. Ed. 135. To the student of our political history, the opinion of Judge Roane in the Virginia court of appeals, denying the validity of the act, and the opinion of Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257, upholding it, must ever remain models of powerful judicial reasoning; and the opinion of Judge Roane is well worthy, not only from its logical force, but its literary excellence, to be put in the same class with the decisions of the great Chief Justice himself. The opinion of Mr. Justice Story in the case of Martin v. Hunter does not seem, in the judgment of the author, to be equal to either of the others. Certainly, his contention that the federal Constitution required Congress to confer all the judicial power granted by the Constitution upon some courts has not been sustained by the subsequent legal history of our country, as there are many cases of federal

SAME—THE PROCEEDINGS REVIEWABLE

188. Any proceeding which is a suit in the state court is reviewable under this provision of law, if it involves any of the questions therein mentioned. It is the object of the act to protect federal constitutional rights, and whether they arise in an ordinary suit, or in an extraordinary proceeding, like habeas corpus or mandamus, provided only they are a court proceeding, they are reviewable.[91]

It has been seen in another connection that there are many court proceedings which are yet not suits at law or in equity, in the sense in which that term is used when discussing the original jurisdiction of the federal courts. That criterion, however, does not apply to these cases in the state courts, and the term is used in a wider sense than in discussing the character of proceedings cognizable in the federal trial courts.[92]

There is no monetary limit to the right of review in these cases, the question itself being of sufficient importance, no matter how small the amount involved; and, as a matter of fact, many of the cases taken to the Supreme Court under this provision have involved very small amounts.[93]

jurisdiction which could have been conferred upon the federal court, but have not been. *See "Courts," Dec. Dig. (Key-No.) § 391; Cent. Dig. §§ 1045, 1092.*

[91] Hartman v. Greenhow, 102 U. S. 672, 26 L. Ed. 271; American Exp. Co. v. Michigan, 177 U. S. 404, 20 Sup. Ct. 695, 44 L. Ed. 823. *See "Courts," Dec. Dig. (Key-No.) § 391; Cent. Dig. §§ 1045, 1092.*

[92] Cases supra.

[93] Buel v. Van Ness, 8 Wheat. 312, 5 L. Ed. 624; The Paquete Habana, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320. *See "Courts," Dec. Dig. (Key-No.) § 394.*

SAME—THE COURTS WHOSE DECISIONS ARE REVIEWABLE

189. The language of the act is, "The highest court of a state in which a decision in the suit could be had." This means the court having final jurisdiction over the special question, not necessarily the state court of highest rank.

It must, however, be a decision of a court, not merely an order of the judge at chambers.[94] It means the last court which could decide the special question,[95] but, where an attempt is made to review under this provision the decision of a court which is not the highest court of the state, it must be shown that this is the court which has final jurisdiction of the special question. If there is a discretionary right of review of such a court by a higher court, the record must show that the party has exhausted his efforts to obtain the benefits of such review before he can take the case up from the lower of the two courts.[96] If an application, however, is made to the highest court of a state for the allowance of an appeal, and that court refuses it, but retains no copy of the record, then the decision should go to the lower court, where the record remains; but if the appellate court acts as a court, and refuses the appeal, and makes an entry of it on its minutes, and retains a copy of the record, then the appeal should go to the higher court.[97]

[94] McKnight v. James, 155 U. S. 685, 15 Sup. Ct. 248, 39 L. Ed. 310. *See "Courts," Dec. Dig. (Key-No.) § 392; Cent. Dig. §§ 1046, 1047.*

[95] Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 22 Sup. Ct. 446, 46 L. Ed. 673. *See "Courts," Dec. Dig. (Key-No.) § 392; Cent. Dig. §§ 1046, 1047.*

[96] Gregory v. McVeigh, 23 Wall. 294, 23 L. Ed. 156; Fisher v. Perkins, 122 U. S. 522, 7 Sup. Ct. 1227, 30 L. Ed. 1192; Mullen v. Western Union Beef Co., 173 U. S. 116, 19 Sup. Ct. 404, 43 L. Ed. 635. *See "Courts," Dec. Dig. (Key-No.) § 392; Cent. Dig. §§ 1046, 1047.*

[97] POLLEYS v. BLACK RIVER IMPROVEMENT CO., 113 U. S. 81, 5 Sup. Ct. 369, 28 L. Ed. 938; Stanley v. Schwalby, 162 U. S. 255,

The writ of error must go to the highest state court, if it has jurisdiction of the matter, even though, as a matter of fact, it is a foregone conclusion that it will act adversely, as in cases of second appeals on questions already settled.[98]

SAME—BY WHOM THE RIGHT OF REVIEW MAY BE INVOKED

190. Only the party actually injuriously affected by the adverse decision can claim such a right of review, not third parties who would be indirectly interested in an adverse decision of the federal question.[99]

Only a party against whose federal claim the decision is rendered can appeal, not one in whose favor such a decision is made.[1]

SAME—CHARACTER OF QUESTIONS REVIEWABLE

191. The only questions reviewable under this section are cases of conflicting state and federal rights, viz.:

(a) Cases where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against the validity.

16 Sup. Ct. 754, 40 L. Ed. 960; Bacon v. Texas, 163 U. S. 207, 16 Sup. Ct. 1023, 41 L. Ed. 132; Wedding v. Meyler, 192 U. S. 573, 24 Sup. Ct. 322, 48 L. Ed. 570; post, p. 569. *See "Courts," Dec. Dig. (Key-No.) § 392; Cent. Dig. §§ 1046, 1047.*

[98] GREAT WESTERN TELEGRAPH CO. v. BURNHAM, 162 U. S. 339, 16 Sup. Ct. 850, 40 L. Ed. 991. See, also, Louisiana Navigation Co. v. Oyster Commission of La., 226 U. S. 99, 33 Sup. Ct. 78, 57 L. Ed. ——. *See "Courts," Dec. Dig. (Key-No.) § 392; Cent. Dig. §§ 1046, 1047.*

[99] Tyler v. Judges of Court of Registration, 179 U. S. 405, 21 Sup. Ct. 206, 45 L. Ed. 252; Braxton County Court v. West Virginia, 208 U. S. 192, 28 Sup. Ct. 275, 52 L. Ed. 450. *See "Courts," Dec. Dig. (Key-No.) § 395; Cent. Dig. §§ 1078, 1079.*

[1] Ryan v. Thomas, 4 Wall. 603, 18 L. Ed. 460; Rutland R. Co. v. Central Vermont R. Co., 159 U. S. 630, 638, 16 Sup. Ct. 113, 40 L. Ed.

(b) Cases where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity.

(c) Cases where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority.

The character of the question decides the right of review, and the citizenship of the parties has nothing to do with it.[2] It is equally manifest that the questions reviewable in this manner are simply federal constitutional questions—that is, conflicts of state and federal authority—and that questions of the conflict of a state statute with a state constitution do not fall under any of these classes.[3] Nor do mere questions of construction, either of the federal or state laws, come under any of these classes, where no question of their validity is involved.[4] Nor are questions of

284. *See "Courts," Dec. Dig. (Key-No.) § 395; Cent. Dig. §§ 1078, 1079.*

[2] French v. Hopkins, 124 U. S. 524, 8 Sup. Ct. 589, 31 L. Ed. 536; Barrington v. Missouri, 208 U. S. 483, 27 Sup. Ct. 582, 51 L. Ed. 890. *See "Courts," Dec. Dig. (Key-No.) § 394; Cent. Dig. §§ 1049–1077.*

[3] Missouri ex rel. Hill v. Dockery, 191 U. S. 165, 24 Sup. Ct. 53, 48 L. Ed. 133; Smith v. Jennings, 206 U. S. 276, 27 Sup. Ct. 610, 51 L. Ed. 1061; Kiernan v. City of Portland, 223 U. S. 151, 32 Sup. Ct. 231, 56 L. Ed. 386. *See "Courts," Dec. Dig. (Key-No.) § 394; Cent. Dig. §§ 1049–1077.*

[4] Choteau v. Marguerite, 12 Pet. 507, 9 L. Ed. 1174; Iroquois Transp. Co. v. Delaney Forge & Iron Co., 205 U. S. 354, 27 Sup. Ct. 509, 51 L. Ed. 836; Smithsonian Institution v. St. John, 214 U. S. 19, 29 Sup. Ct. 601, 53 L. Ed. 892. *See "Courts," Dec. Dig. (Key-No.) § 394; Cent. Dig. §§ 1049–1077.*

general law thus reviewable.[5] The questions, in order to be reviewable, however, must be sufficiently open to doubt to show that the claim is bona fide and with some color of merit, and not a bare assertion of an obviously unfounded one.[6]

The effect of a proceeding to review the decision of the state courts under this section is simply to bring up federal questions of law.[7] Even in a chancery case only questions of law are reviewable, for the statute provides that the decisions of the state courts are reviewable only by writ of error, and it could not have been the intention to give a general review of all questions of law and fact involved in the case so taken up.[8]

The classes of questions reviewable, as has been seen, subdivide into three. The first of these is where the validity of a treaty or statute or authority exercised under the United States is questioned in the state court; but such a federal statute or authority must be actually drawn in question, and no review lies from a mere decision of a state court construing a federal statute.[9] Hence there are many

[5] Grame v. Mutual Assur. Co., 112 U. S. 273, 5 Sup. Ct. 150, 28 L. Ed. 716. Nor were questions of pleading involving no denial of a federal right. Brinkmeier v. Missouri Pac. R. Co., 224 U. S. 268, 32 Sup. Ct. 412, 56 L. Ed. 758. *See "Courts," Dec. Dig. (Key-No.) § 394; Cent. Dig. §§ 1049–1077.*

[6] Wabash R. Co. v. Flannigan, 192 U. S. 29, 24 Sup. Ct. 224, 48 L. Ed. 328; Gring v. Ives, 222 U. S. 365, 32 Sup. Ct. 167, 56 L. Ed. 235; Deming v. Carlisle Packing Co., 226 U. S. 102, 33 Sup. Ct. 80, 57 L. Ed. ——. *See "Courts," Dec. Dig. (Key-No.) § 394; Cent. Dig. §§ 1049–1077.*

[7] Chapman & D. Land Co. v. Bigelow, 206 U. S. 41, 27 Sup. Ct. 679, 51 L. Ed. 953. *See "Courts," Dec. Dig. (Key-No.) § 399; Cent. Dig. §§ 1089–1090.*

[8] EGAN v. HART, 165 U. S. 188, 17 Sup. Ct. 300, 41 L. Ed. 680; Earling v. Ernigh, 218 U. S. 27, 30 Sup. Ct. 672, 54 L. Ed. 915. But it may be necessary to look into questions of fact to ascertain the federal question involved. Cedar Rapids Gaslight Co. v. City of Cedar Rapids, 223 U. S. 655, 32 Sup. Ct. 389, 56 L. Ed. 594. *See "Courts," Dec. Dig. (Key-No.) § 399; Cent. Dig. §§ 1089–1090.*

[9] Kennard v. Nebraska, 186 U. S. 304, 22 Sup. Ct. 879, 46 L. Ed.

federal questions upon which the state courts can pass, and over which the federal courts have no right of review, such as questions of mere construction, not appearing on the face of the plaintiff's pleading, in which case, as has been seen, no right of removal exists, or questions so appearing in cases involving less than three thousand dollars, or proceedings not amounting to suits, in which cases, also, no right of removal exists.

The second of these classes is where a state statute is questioned in the state court as repugnant to the federal Constitution or laws, and the court sustains the state statute. This is a very common class of jurisdiction. One of the most frequent instances of its exercise is where state laws are alleged to violate the constitutional provisions against impairing the obligation of contracts—a provision applying not simply to the acts of the state legislature, but also to the acts of any subordinate legislative body, like a municipality, but not the acts of executive or judicial officers.[10] Another instance is the question whether the taking of property under a state statute constitutes a taking for public use, or deprives the party of his property without due process of law.[11] The third class, under the statute, is where a title, right, privilege, or immunity is claimed under the federal Constitution or laws, or a commission or authority exercised under the United States, and the decision is against the right specially set up or claimed by

1175. *See "Courts," Dec. Dig. (Key-No.) § 394; Cent. Dig. §§ 1049–1077.*

[10] Williams v. Louisiana, 103 U. S. 637, 26 L. Ed. 595; Citizens' Bank v. Parker, 192 U. S. 73, 24 Sup. Ct. 181, 48 L. Ed. 346; Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 24 Sup. Ct. 310, 48 L. Ed. 598; Bacon v. Texas, 163 U. S. 207, 16 Sup. Ct. 1023, 41 L. Ed. 132; State of Louisiana ex rel. Hubert v. New Orleans, 215 U. S. 170, 30 Sup. Ct. 40, 54 L. Ed. 144. *See "Courts," Dec. Dig. (Key-No.) § 394; Cent. Dig. §§ 1049–1077.*

[11] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369. *See "Courts," Dec. Dig. (Key-No.) § 394; Cent. Dig. §§ 1049–1077.*

either party. This also is a very common exercise of the jurisdiction. It cannot be invoked, however, where both parties set up title through a common source to the United States.[12] It covers, however, not simply questions of validity or supremacy of the federal Constitution or laws, but also authority exercised under the United States—in this respect being wider than the clause conferring jurisdiction on the trial courts of the United States by removal, where only questions under the Constitution or laws give the right.[13] The question whether a proceeding in a state court put the accused twice in jeopardy, contrary to the provisions of the federal Constitution, raises such a question.[14] The question as to the effect of a sale under the bankrupt law is such a question.[15] So, also, the question whether a party is entitled to a removal of his case from the state court under the provisions of the removal act.[16] So rights or causes of action claimed under the national banking law.[17] So, too, the question whether a carrier

[12] California ex rel. Hastings v. Jackson, 112 U. S. 233, 5 Sup. Ct. 113, 28 L. Ed. 712. *See "Courts," Dec. Dig. (Key-No.) § 394; Cent. Dig. §§ 1049–1077.*

[13] Carson v. Dunham, 121 U. S. 421, 427, 7 Sup. Ct. 1030, 30 L. Ed. 992. *See "Courts," Dec. Dig. (Key-No.) § 394; Cent. Dig. §§ 1049–1077.*

[14] Keerl v. State of Montana, 213 U. S. 135, 29 Sup. Ct. 469, 53 L. Ed. 734. *See "Courts," Dec. Dig. (Key-No.) § 394; Cent. Dig. §§ 1049–1077.*

[15] Factors' & Traders' Ins. Co. v. Murphy, 111 U. S. 738, 4 Sup. Ct. 679, 28 L. Ed. 582; New Orleans, S. F. & L. R. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. Ed. 244. So the denial of the right of a trustee in bankruptcy to recover assets of the estate. Rector v. City Deposit Bank Co., 200 U. S. 405, 26 Sup. Ct. 289, 50 L. Ed. 527. Compare Corbett v. Craven, 215 U. S. 125, 30 Sup. Ct. 64, 54 L. Ed. 122. So the refusal of a state court to give effect to a discharge. Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. ——. *See "Courts," Dec. Dig. (Key-No.) § 394; Cent. Dig. §§ 1049–1077.*

[16] SOUTHERN RY. CO. v. ALLISON, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078. *See "Courts," Dec. Dig. (Key-No.) § 394; Cent. Dig. §§ 1049–1077.*

[17] McCormick v. Market Nat. Bank, 165 U. S. 538, 17 Sup. Ct. 433,

who pays duties on imports exacted under a federal statute has a lien against the owner of the goods for reimbursement.[18]

SAME—HOW A FEDERAL QUESTION MUST BE RAISED OR SHOWN BY THE RECORD

192. In order to avail of the right to review the action of a state court on a federal question, it must be raised in the state court in the manner in which a question of that nature should be raised by the state practice, and the record must show this.

If, for instance, it arises in connection with a question of evidence, and the party in the state court does not seasonably object or take a proper bill of exceptions to the action of the state court, where a bill of exceptions is necessary, and therefore the state Supreme Court decides that the question cannot be considered, because not properly raised, the benefit of the question is lost.[19] It need not necessarily appear in the pleadings, and in fact there are many questions which could not be made to appear by the pleadings, but it must certainly appear somewhere in the record that the point was made and insisted upon. On this subject Chief Justice Fuller has said:

"As the validity of no treaty or statute of, or authority exercised under, the United States, nor of a statute of, or authority exercised under, any state, was drawn in question,

41 L. Ed. 817; Talbot v. First Nat. Bank, 185 U. S. 172, 22 Sup. Ct. 612, 46 L. Ed. 857. *See "Courts," Dec. Dig. (Key-No.) § 394; Cent. Dig. §§ 1049–1077.*

[18] Wabash R. Co. v. Pearce, 192 U. S. 179, 24 Sup. Ct. 231, 48 L. Ed. 397. *See "Courts," Dec. Dig. (Key-No.) § 394; Cent. Dig. §§ 1049–1077.*

[19] Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 23 Sup. Ct. 375, 47 L. Ed. 480, 63 L. R. A. 33; Thomas v. Iowa, 209 U. S. 258, 28 Sup. Ct. 487, 52 L. Ed. 782; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061. *See "Courts," Dec. Dig. (Key-No.) § 396; Cent. Dig. § 1080.*

it is essential to the maintenance of our jurisdiction that it should appear that some title, right, privilege, or immunity under the Constitution or laws of the United States was specially set up or claimed in the state court, and that the decision of the highest court of the state in which such decision could be had was against the title, right, privilege, or immunity so set up or claimed, and in that regard certain propositions must be regarded as settled:

"(1) That the certificate of the presiding judge of the state court as to the existence of grounds upon which our interposition might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to re-examine the judgment below.

"(2) That the title, right, privilege, or immunity must be specially set up or claimed at the proper time and in the proper way.

"(3) That such claim cannot be recognized as properly made when made for the first time in a petition for rehearing after judgment.

"(4) That the petition for the writ of error forms no part of the record upon which action is taken here.

"(5) Nor do the arguments of counsel, though the opinions of the state courts are now made such by rule.

"(6) The right on which the party relies must have been called to the attention of the court in some proper way, and the decision of the court must have been against the right claimed.

"(7) Or at all events it must appear from the record by clear and necessary intendment that the federal question was directly involved, so that the state court could not have given judgment without deciding it; that is, a definite issue as to the decision of the right must be distinctly deducible by the record before the state court can be held to have disposed of such federal question by its decision." [20]

[20] **SAYWARD v. DENNY, 158 U. S. 180, 15 Sup. Ct. 777, 39 L. Ed. 941; Hulbert v. Chicago, 202 U. S. 275, 26 Sup. Ct. 617, 50 L. Ed. 1026.** *See "Courts," Dec. Dig. (Key-No.) § 398; Cent. Dig. §§ 1085–1088.*

The requirement as to the record showing is a little stronger in the third class of questions than in the first two —due to the fact that in the third class it is required by the language of the statute itself that the title, right, privilege, or immunity must be specially set up and claimed. On this point the Supreme Court has said:

"To the argument that the federal right was not specially set up and claimed, in the language of Rev. St. § 709 (U. S. Comp. St. 1901, p. 575), it is replied that this is not one of the cases in which it is necessary to do so. Under this section there are three classes of cases in which the final decree of a state court may be re-examined here:

"(1) Where is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, and the decision is against their validity.

"(2) Where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity.

"(3) Or where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up and claimed by either party under such Constitution, statute, commission, or authority.

"There is no doubt that under the third class the federal right, title, privilege, or immunity must be, with possibly some rare exceptions, specially set up or claimed, to give this court jurisdiction.

"But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that if the federal question appears in the record, and

was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against the review of such question here." [21]

The question must be raised before a judgment in the state court, and if of the third class, must, as has been seen, be specially set up.[22] It may be raised by a motion for a new trial and assignment of errors in the state court, if that is not too late under the state practice, especially if the opinion of the state court shows that the question was passed upon.[23] It cannot, however, be raised for the first time in the assignment of errors and petition for a writ of error in the United States Supreme Court.[24] It cannot be raised for the first time by a petition for rehearing in the state appellate court if the petition is refused, but if the state court on the petition for rehearing, considers the question, then it is properly in the record for the purposes of review by the United States Supreme Court.[25] It must appear from the record, however, that the case in the state court turned on the federal question, and that it must have

[21] Columbia Water Power Co. v. Columbia Electric Street R., Light & Power Co., 172 U. S. 475, 19 Sup. Ct. 247, 43 L. Ed. 521; Harding v. Illinois, 196 U. S. 78, 25 Sup. Ct. 176, 49 L. Ed. 394. *See "Courts," Dec. Dig. (Key-No.) § 396; Cent. Dig. § 1080.*

[22] Yazoo & M. R. Co. v. Adams, 180 U. S. 1, 21 Sup. Ct. 240, 45 L. Ed. 395; Turner v. Richardson, 180 U. S. 87, 21 Sup. Ct. 295, 45 L. Ed. 438. *See "Courts," Dec. Dig. (Key-No.) § 396; Cent. Dig. § 1080.*

[23] Rothschild v. Knight, 184 U. S. 334, 22 Sup. Ct. 391, 46 L. Ed. 573; Farmers' & Merchants' Ins. Co. v. Dobney, 189 U. S. 301, 23 Sup. Ct. 565, 47 L. Ed. 821; Chambers v. Baltimore & O. R. Co., 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143. *See "Courts," Dec. Dig. (Key-No.) § 396; Cent. Dig. § 1080.*

[24] Appleby v. City of Buffalo, 221 U. S. 524, 31 Sup. Ct. 699, 55 L. Ed. 838. *See "Courts," Dec. Dig. (Key-No.) § 396; Cent. Dig. § 1080.*

[25] McCorquodale v. Texas, 211 U. S. 432, 29 Sup. Ct. 146, 53 L. Ed. 269; Kentucky Union Co. v. Commonwealth of Kentucky, 219 U. S. 140, 31 Sup. Ct. 171, 55 L. Ed. 137. *See "Courts," Dec. Dig. (Key-No.) § 398; Cent. Dig. §§ 1085–1088.*

been passed upon, not merely that it might have been.[26] If the record shows that the federal question was necessarily involved, so that a decision could not have been rendered without passing upon it, then it is sufficiently involved for the purposes of a review by the United States Supreme Court, even though the opinion of the state court does not show that it was passed upon, or though the state court failed to make an express ruling upon it.[27]

Where there is no opinion filed by the state court, the certificate of the court that a federal question was passed upon will be considered by the Supreme Court in deciding whether such a question was involved.[28]

It is frequently the case that the record in a state court shows not only federal questions, but nonfederal questions as well. If, under these circumstances, the decision of the state court on the nonfederal question is sufficient to dispose of the case without taking the federal question into consideration at all, then no right of review of the case exists in the United States Supreme Court, and it will dismiss a writ of error taken in such a case.[29] The Supreme Court in such a review has jurisdiction, although it may

[26] Detroit City Ry. Co. v. Guthard, 114 U. S. 136, 5 Sup. Ct. 811, 29 L. Ed. 118; New York Cent. & H. R. R. Co. v. New York, 186 U. S. 269, 22 Sup. Ct. 916, 46 L. Ed. 1158. *See "Courts," Dec. Dig. (Key-No.) § 398; Cent. Dig. §§ 1085–1088.*

[27] Chicago Life Ins. Co. v. Needles, 113 U. S. 574, 5 Sup. Ct. 681, 28 L. Ed. 1084; Arrowsmith v. Harmoning, 118 U. S. 194, 6 Sup. Ct. 1023, 30 L. Ed. 243; Erie R. Co. v. Purdy, 185 U. S. 148, 22 Sup. Ct. 605, 46 L. Ed. 847. *See "Courts," Dec. Dig. (Key-No.) § 398; Cent. Dig. §§ 1085–1088.*

[28] Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 22 Sup. Ct. 26, 46 L. Ed. 86; Rector v. City Deposit Bank Co., 200 U. S. 405, 26 Sup. Ct. 289, 50 L. Ed. 527. But while such certificate may aid in removing a doubt, it cannot supply a total failure of the record to show a federal question. Louisville & N. R. Co. v. Smith, 204 U. S. 551, 27 Sup. Ct. 401, 51 L. Ed. 612; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 32 Sup. Ct. 790, 56 L. Ed. 1171. *See "Courts," Dec. Dig. (Key-No.) § 398; Cent. Dig. §§ 1085–1088.*

[29] EUSTIS v. BOLLES, 150 U. S. 361, 14 Sup. Ct. 131, 37 L. Ed. 1111; Arkansas Southern R. Co. v. German Nat. Bank, 207 U. S. 270, 28 Sup. Ct. 78, 52 L. Ed. 201; Berea College v. Kentucky, 211

turn out, as the final result, that the federal question claimed was not legally sustainable, for it must have jurisdiction to consider at least the question whether it is sustainable or not.[30]

It appears from the discussion of the various classes of federal jurisdiction heretofore considered that there are three contingencies under which a federal question can come before the federal courts for decision, and slightly different principles regulate each one of these cases. The first is in connection with the original jurisdiction of the federal trial courts, whether in actions originally instituted in them, or actions taken to them by removal. In these cases a federal question may arise not simply in connection with the federal Constitution, as affecting the validity of a state or federal law, but also in connection with the construction of both the federal Constitution, laws, and treaties. Whenever under them the right of recovery hinges upon the construction or application of the federal Constitution, laws, or treaties, such a question is involved, and the original jurisdiction of the federal court vests, provided the fact that such a question is involved appears upon the plaintiff's pleadings. In this connection, therefore, the term "federal question" is used in its widest sense.[31]

The second class in which federal questions may arise is in connection with the right of appeal from the federal courts of original jurisdiction direct to the Supreme Court. This class of questions, however, is federal constitutional questions, not mere questions of the construction or application of a federal law. They may arise, however, not only when the plaintiff's pleadings show such a question to be

U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81. *See "Courts," Dec. Dig. (Key-No.) § 391; Cent. Dig. §§ 1045, 1092.*

[30] Chicago Life Ins. Co. v. Needles, 113 U. S. 574, 5 Sup. Ct. 681, 28 L. Ed. 1084; Blythe v. Hinckley, 180 U. S. 333, 21 Sup. Ct. 390, 45 L. Ed. 557. *See "Courts," Dec. Dig. (Key-No.) § 391; Cent. Dig. §§ 1045, 1092.*

[31] Ante, pp. 235, 309.

involved, but also when set up as a defense in the case, and they may arise in this connection whether the decision is in favor of or against the constitutional right asserted.[82]

The last class is the one which has just been discussed in connection with the right of review of state court decisions by the Supreme Court. In this class the question need not necessarily arise by the plaintiff's pleadings, but may arise in subsequent stages of the cause. The court, however, has jurisdiction in such case only where the decision is against the constitutional question asserted, and the questions involved are solely federal constitutional questions, and not questions of mere construction. In this sense, therefore, the term "federal question" has its narrowest meaning.

[82] Ante, pp. 497, 505.

CHAPTER XXIII

PROCEDURE ON ERROR AND APPEAL

193. Review by the Supreme Court.
194. Same—Writ of Error.
195. Same—Appeal.
196. Same—Other Methods.
197. Review by the Circuit Court of Appeals.
198. Trial in the Appellate Courts.

REVIEW BY THE SUPREME COURT

193. Review by the Supreme Court of decisions in the cases over which it exercises appellate jurisdiction is had by means of writ of error or appeal, and by certain other methods provided by statute in certain cases.

Only final judgments or decrees can be made the subject of review by writ of error or appeal.

The appellate courts of the United States of general interest are the Supreme Court and the circuit courts of appeals, and the jurisdiction respectively vested in them has been discussed in the two preceding chapters. It is now necessary to consider the method of invoking that jurisdiction, and bringing and trying cases before them.

The Supreme Court

The courts to which the right of review of the Supreme Court extends are, in the first place, the district courts. The time of taking an appeal from these courts is prescribed by section 1008 of the Revised Statutes.[1] It must be within two years after the entry of the judgment, decree, or order which it is desired to review.

[1] U. S. Comp. St. 1901, p. 715.

It is not every decree or order which can be made the subject of review. Were this not so, there might be an endless number of appeals in any one case; and hence it is a principle, subject to but few exceptions, to be hereafter named, that only final judgments or decrees can be made the subject of appellate review. Thus the case is finally ended in the lower court, and the process of review brings before the appellate court, once and for all, the entire case. The question what constitutes a final judgment is a matter of little difficulty in a common-law proceeding. It is a matter of great difficulty in an equity proceeding. The flexible character of equity causes and the infinite variety of equity decrees render it difficult to define exactly what constitutes a final decree or order in any equity case. The general principle is that a decree is final if it settles the principles of the cause, and leaves only ministerial acts by which its decision is to be carried out; but, although it may settle the main issue in a cause, it is not final if anything is left to the lower court involving the exercise of judicial power, rather than ministerial. On this subject the Supreme Court has said:

"Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees. It has usually arisen upon appeals taken from the decrees claimed to be interlocutory, but it has occasionally happened that the power of a court to set aside such a decree at a subsequent term has been the subject of dispute. The cases, it must be conceded, are not altogether harmonious. Upon one hand, it is clear that a decree is final, though the case be referred to a master to execute the decree by a sale of property or otherwise, as in the case of the foreclosure of a mortgage. If, however, the decree of foreclosure and sale leaves the amount due upon the debt to be determined, and the property to be sold ascertained and defined, it is not final. A like result follows if it merely determines the validity of the mortgage, and,

without ordering sale, directs the case to stand continued for further decree upon the coming in of the master's report.

"It is equally well settled that a decree in admiralty determining the question of liability for a collision or other tort, or in equity establishing the validity of a patent, and referring the case to a master to compute and report the damages, is interlocutory merely.

"It may be said, in general, that if the court make a decree fixing the rights and liabilities of the parties, and thereupon refer the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final; but if it refer the case to him as a subordinate court, and for a judicial purpose, as to state an account between the parties, upon which a further decree is to be entered, the decree is not final. But even if an account be ordered taken, if such accounting be not asked for in the bill, and be ordered simply in execution of the decree, and such decree be final as to all matters within the pleadings, it will still be regarded as final." [2]

Even if the appeal from the district or circuit court is on a jurisdictional question only, and by certificate, it can still be taken only after a final decree is entered in the cause.[3]

[2] McGOURKEY v. TOLEDO & O. R. CO., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. Ed. 1079. See, also, Keystone Manganese & Iron Co. v. Martin, 132 U. S. 91, 10 Sup. Ct. 32, 33 L. Ed. 275; Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co., 173 U. S. 582, 19 Sup. Ct. 551, 43 L. Ed. 818; Montgomery v. Anderson, 21 How. 386, 16 L. Ed. 160; United States Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055. *See "Appeal and Error," Dec. Dig. (Key-No.) §§ 70, 71; Cent. Dig. §§ 386–401.*

[3] Bardes v. First Nat. Bank, 175 U. S. 526, 20 Sup. Ct. 196, 44 L. Ed. 261; Bowker v. U. S., 186 U. S. 135, 22 Sup. Ct. 802, 46 L. Ed. 1090. *See "Admiralty," Dec. Dig. (Key-No.) § 103; "Courts," Dec. Dig. (Key-No.) § 382.*

SAME—WRIT OF ERROR

194. The review is by writ of error in cases of a common-law nature, civil or criminal, which are triable by a jury.

By this method, only errors of law which have been embodied in the record in the manner usual in common-law cases can be reviewed.

The writ of error is a writ of the appellate court to the trial court for the purpose of bringing up the record for review.

Notice of appeal or the issuance of a writ of error is given to the parties by citation.

Bond satisfactory to the judge issuing the writ or allowing the appeal must be given as a condition of the appeal.

The seventh amendment of the Constitution provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Pursuant to this constitutional provision, section 1011 of the Revised Statutes [4] provides:

"There shall be no reversal in the Supreme Court or in a circuit court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."

Under these provisions, the writ of error performs the office of bringing up for review simply questions of law in cases of common-law nature which are triable by a jury.

[4] U. S. Comp. St. 1901, p. 715. This section applies only to cases brought up from the inferior federal courts, not to cases brought up from the state courts. Buck Stove & Range Co. v. Vickers, 226 U. S. 205, 33 Sup. Ct. 41, 57 L. Ed. ——.

The question what cases are covered by this constitutional amendment has been discussed at length in a recent decision of the Supreme Court. It says:

"It must therefore be taken as established, by virtue of the seventh amendment of the Constitution, that either party to an action at law (as distinguished from suits in equity or in admiralty) in a court of the United States, where the value in controversy exceeds twenty dollars, has the right to a trial by jury; that, when a trial by jury has been had in an action at law in a court either of the United States or of a state, the facts there tried and decided cannot be re-examined in any court of the United States otherwise than according to the rules of the common law of England; that, by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had, or to which the record was returnable, or ordered by any appellate court for error in law; and therefore that, unless a new trial has been granted in one of these two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States. * * *

"Trial by jury, in the primary and usual sense of the term at the common law and in the American Constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if, in his opinion, it is against the law or the evidence." [5]

[5] CAPITAL TRACTION CO. v. HOF, 174 U. S. 1, 13, 19 Sup. Ct. 580, 43 L. Ed. 873. *See "Jury," Dec. Dig. (Key-No.) § 9; Cent. Dig. § 14.*

The questions of law which can be examined on writ of error are simply those which appear by the record in a common-law case to have been raised and passed upon by the lower court, or to have been essential to its decision. The record in a common-law case is very different from that in an equity or admiralty case. It contains only the pleadings and orders of court, but not the evidence or the instructions, unless they have been made part of the record by a bill of exceptions. Hence on writ of error only errors of law can be considered which have been embodied in the record in the manner usual in common-law cases.[6] This same principle applies to common-law cases tried and determined by the court after a jury has been waived by the parties. There, too, according to the provisions of section 700 of the Revised Statutes,[7] only those rulings of the court in the progress of the cause which are duly excepted to and presented by a bill of exceptions can be reviewed.[8]

Form and Method of Issue of Writ of Error

Section 1004 of the Revised Statutes[9] provides as follows:

"Writs of error returnable to the Supreme Court may be issued as well by the clerks of the circuit courts under the seals thereof, as by the clerk of the Supreme Court. When so issued they shall be, as nearly as each case may admit, agreeable to the form of a writ of error transmitted to the clerks of the several circuit courts by the clerk of the Su-

[6] St. Clair v. U. S., 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936. *See "Appeal and Error," Dec. Dig. (Key-No.) § 859; Cent. Dig. §§ 3441–3445.*

[7] U. S. Comp. St. 1901, p. 570.

[8] Norris v. Jackson, 9 Wall. 125, 19 L. Ed. 608; Mercantile Mut. Ins. Co. v. Folsom, 18 Wall. 249, 21 L. Ed. 827; Town of Martinton v. Fairbanks, 112 U. S. 674, 5 Sup. Ct. 321, 28 L. Ed. 862; Wilson v. Merchants' Loan & Trust Co., 183 U. S. 121, 22 Sup. Ct. 55, 46 L. Ed. 113. See ante, p. 400. *See "Courts," Dec. Dig. (Key-No.) §§ 385, 399, 406; "Appeal and Error," Cent. Dig. §§ 3387–3393.*

[9] U. S. Comp. St. 1901, p. 713.

preme Court, in pursuance of section 9 of the act of May 8, 1792, chapter 36. * * *"

In consequence of the abolition of the circuit court by the Judicial Code the amendment of Rev. St. (U. S.) § 1004, by Act Jan. 22, 1912, c. 12, 37 Stat. 54, permits the clerks of the district courts and of the circuit courts of appeals to issue the writ.

This writ is the formal method of transferring the record from the inferior to the appellate court for purposes of review. Although now most frequently issued by the clerk of the district court, it is the writ and process of the Supreme Court commanding the lower court to send up to it for review the record made up as necessary for that purpose. Hence the original writ should be returned to the Supreme Court, whose process it is. On this subject Mr. Justice Miller says:

"We are of opinion that the original writ should always be returned to this court with the transcript of the record. The writ of error is the writ of this court, and not of the circuit court, whose clerk may actually issue it. The early practice was that it could only issue from the office of the clerk of the Supreme Court, and in the case of West v. Barnes [2 Dall. 401, 1 L. Ed. 433] at the August term, 1791, it was so decided. This decision led to the enactment of the ninth section of the act of 1792, by which it was provided that the clerk of the Supreme Court, assisted by any two justices of said court, should prescribe the form of a writ of error, copies of which should be forwarded to the clerks of the circuit courts, and that such writs might be issued by these clerks, under the seals of their respective courts. The form of the writ provided under this act has been in use ever since. It runs in the name of the President, and bears the teste of the chief justice of this court. It is in form and in fact, the process of this court, directed to the judges of the circuit court, commanding them to return with said writ, into this court, a transcript of the record of the case mentioned in the writ.

"When deposited with the clerk of the court to whose judges it is directed, it is served; and the transcript which the clerk sends here is a return to the writ, and should be accompanied by it." [10]

It is not essential that a writ of error should be allowed by any judge in appeals from one federal court to another, for such appeals are matters of right.[11] The practice, however, has always been to have a writ of error allowed by a judge, and this practice is recognized by rule 36 [12] of the Supreme Court, which provides:

"An appeal or a writ of error from a district court direct to this court, in the cases provided for in sections 238 and 252 of the act entitled 'An act to codify, revise, and amend the laws relating to the judiciary,' approved March 3, 1911, chapter 231, may be allowed, in term time or in vacation by any justice of this court, or by any circuit judge assigned to the district court, or by any district judge within his district, and the proper security be taken and the citation signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal."

The form of the writ of error in use, and of the citation accompanying the same, can be seen in Worcester v. Georgia.[13]

[10] MUSSINA v. CAVAZOS, 6 Wall. 355, 18 L. Ed. 810. See, also, Brown v. McConnell, 124 U. S. 489, 490, 491, 8 Sup. Ct. 559, 31 L. Ed. 495. *See "Appeal and Error," Dec. Dig. (Key-No.) §§ 399–402; Cent. Dig. §§ 2103–2114.*

[11] Davidson v. Lanier, 4 Wall. 447, 18 L. Ed. 377; BARTEMEYER v. IOWA, 14 Wall. 26, 20 L. Ed. 792. There is one instance in which an appeal from an inferior federal court is not a matter of right. It is in habeas corpus cases, where the detention is under process of a state court. In such case Act March 10, 1908, c. 76, 35 Stat. 40 (U. S. Comp. St. Supp. 1911, p. 255), requires a certificate from the justice or judge allowing the appeal that there exists probable cause for an appeal. *See "Courts," Dec. Dig. (Key-No.) §§ 385, 405.*

[12] 32 Sup. Ct. xiii.

[13] 6 Pet. 531, 532, 8 L. Ed. 483. *See "Appeal and Error," Dec. Dig. (Key-No.) §§ 399–402; Cent. Dig. §§ 2103–2114; "Courts," Dec. Dig. (Key-No.) §§ 397, 405; Cent. Dig. § 1082.*

The Return of the Writ of Error and the Papers Accompanying it

Section 997 of the Revised Statutes [14] provides as follows:

"There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party."

The transcript of the record is regulated by Supreme Court rule 8,[15] which provides:

"The clerk of the court to which any writ of error may be directed shall make return of the same by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court. * * *

"In all cases brought to this court by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case."

This certificate to the record is signed by the clerk, and need not be signed by the judge.[16]

The assignment of errors is a very important part of the appellate papers. Although expressly required by statute, the failure to annex an assignment of errors is not fatal to the jurisdiction. The thirty-fifth rule [17] of the Supreme Court provides as follows:

"Where an appeal or a writ of error is taken from a district court direct to this court, under section 238 of the act entitled 'An act to codify, revise and amend the laws relating to the Judiciary,' approved March 3, 1911, chapter

[14] U. S. Comp. St. 1901, p. 712.

[15] 32 Sup. Ct. vi, vii.

[16] Worcester v. Georgia, 6 Pet. 515, 8 L. Ed. 483. *See "Appeal and Error," Dec. Dig. (Key-No.) § 612; Cent. Dig. §§ 2697, 2699.*

[17] 32 Sup. Ct. xiii.

231, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error and appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

In pursuance of the same policy, the twenty-first rule of the Supreme Court requires the counsel for the plaintiff in error or appellant to embody in his brief a specification of the errors relied on practically in the form of an assignment of errors. Under these provisions, the failure to annex the assignment of errors to the transcript itself is not fatal to the jurisdiction, as above stated.[18]

But if there is no assignment of errors in the record, and no proper specification in the brief, the appellate court will dismiss the case, as it is entitled to some assistance from counsel in winnowing out from a large record the pivotal questions.[19]

[18] Independent School Dist. of Ackley v. Hall, 106 U. S. 428, 1 Sup. Ct. 417, 27 L. Ed. 237; U. S. v. Pena, 175 U. S. 500, 20 Sup. Ct. 165, 44 L. Ed. 251. *See "Appeal and Error," Dec. Dig. (Key-No.) § 758; Cent. Dig. § 3093.*

[19] Benites v. Hampton, 123 U. S. 519, 8 Sup. Ct. 254, 31 L. Ed. 260. *See "Appeal and Error," Dec. Dig. (Key-No.) §§ 758, 784; Cent. Dig. §§ 3093, 3126.*

It is customary to file a short petition for the writ of error with the assignment of errors, and to insert in it the prayer for reversal, but it is not essential, and almost any language at all similar would be construed as a prayer for reversal.[20]

The Citation

It is obvious from the above that the writ of error is not a process intended for the parties to the cause at all. It is intended for the lower court, and is a method of directing that court to send up to the appellate court the proper record. But it is essential that the parties to the cause should also have notice when it is intended to take a case to an appellate court for review. This is accomplished by the citation, which, as seen above, must also be annexed to the record, and service of it upon the opposite party is necessary unless waived. The provision for the citation is contained in section 999 of the Revised Statutes,[21] the conclusion of which is as follows:

"When the writ is issued by the Supreme Court to a circuit court, the citation shall be signed by a judge of such circuit court, or by a justice of the Supreme Court, and the adverse party shall have at least thirty days' notice. * * *"

This is also provided by Supreme Court rule 36, already quoted.

This paper must be signed by the judge, not by the clerk, being different in this respect from the writ of error.[22] It may be served upon the party or upon his attorney of record.[23] A citation, however, is nothing but an ordinary process, giving a party notice of a new court proceeding,

[20] MUSSINA v. CAVAZOS, 6 Wall. 355, 18 L. Ed. 810. *See "Appeal and Error," Dec. Dig. (Key-No.) § 400; Cent. Dig. §§ 2107–2112.*

[21] U. S. Comp. St. 1901, p. 712.

[22] Chaffee v. Hayward, 20 How. 208, 15 L. Ed. 804. *See "Appeal and Error," Dec. Dig. (Key-No.) § 406; Cent. Dig. §§ 2123–2127.*

[23] Bigler v. Waller, 12 Wall. 142, 20 L. Ed. 260. *See "Appeal and Error," Dec. Dig. (Key-No.) § 407; Cent. Dig. §§ 2120, 2128–2132.*

and therefore the ordinary rules as to the service of process apply to it. A general appearance of the party is a waiver of any defects in form or service.[24] It cannot be served by mailing it in the post office, directed to the opposite party or his attorney.[25] In a common-law case taken up by writ of error, the taking of an appeal in open court is not a waiver of the necessity for a citation. This is because a writ of error is not the act of the party, but the act of the court, and differs in this respect from an appeal, in which case, as will be seen, taking and perfecting an appeal in open court obviates the necessity for a citation.[26]

The Parties to a Writ of Error

The only parties who can sue out a writ of error from an obnoxious judgment are parties to the cause.[27] It is also an established principle that, if the judgment is a joint judgment, all the parties jointly interested must unite in suing out the writ of error, and their separate names must be given. It cannot be sued out merely in a firm name.[28]

The reason why all the parties must join where the judgment is joint is that otherwise the court could not execute its decree on the parties who refused to join, and such parties might in their turn attempt to review the case also.

But if the other parties interested do not care to appeal, the one who desires to do so can accomplish this purpose

[24] Chaffee v. Hayward, 20 How. 208, 15 L. Ed. 804; Aldrich v. Ætna Ins. Co., 8 Wall. 491, 19 L. Ed. 473. *See "Appeal and Error," Dec. Dig. (Key-No.) § 409; Cent. Dig. §§ 2188–2190.*

[25] Tripp v. Santa Rosa St. Ry. Co., 144 U. S. 126, 12 Sup. Ct. 655, 36 L. Ed. 371. *See "Appeal and Error," Dec. Dig. (Key-No.) § 407; Cent. Dig. §§ 2120, 2128–2130.*

[26] U. S. v. Phillips, 121 U. S. 254, 7 Sup. Ct. 874, 30 L. Ed. 914. *See "Appeal and Error," Dec. Dig. (Key-No.) § 397; Cent. Dig. § 2101.*

[27] Payne v. Niles, 20 How. 219, 15 L. Ed. 895. *See "Appeal and Error," Dec. Dig. (Key-No.) § 327; Cent. Dig. §§ 1814–1835.*

[28] Feibelman v. Packard, 108 U. S. 14, 1 Sup. Ct. 138, 27 L. Ed. 634; Estes v. Trabue, 128 U. S. 225, 9 Sup. Ct. 58, 32 L. Ed. 437. *See "Appeal and Error," Dec. Dig. (Key-No.) § 327; Cent. Dig. §§ 1814–1835.*

by a course equivalent to the old proceeding known as "summons and severance." It is not necessary to follow this proceeding exactly, but it is sufficient to give written notice to the other parties similarly interested to appear, and to make the record show that they had been so notified, and had refused to join. In this way only can all parties be bound by the action of the appellate court, and the decree dispose of the whole matter in controversy. A mere statement in the petition for appeal that it had been done is not sufficient for this purpose.[29]

Method of Suspending the Enforcement of the Judgment

Section 1000 of the Revised Statutes[30] provides as follows: "Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

And section 1007 of the Revised Statutes[31] provides as follows: "In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judg-

[29] Masterson v. Herndon, 10 Wall. 416, 19 L. Ed. 953; Inglehart v. Stansbury, 151 U. S. 68, 14 Sup. Ct. 237, 38 L. Ed. 76. *See "Appeal and Error," Dec. Dig. (Key-No.) § 323; Cent. Dig. §§ 1796–1805.*

[30] U. S. Comp. St. 1901, p. 712.

[31] U. S. Comp. St. 1901, p. 714.

ment, or afterward with the permission of a justice or judge of the appellate court. And in such cases, where a writ of error may be a supersedeas, execution shall not issue until the expiration of ten days."

The bond required by these statutes must be taken by the judge, and he cannot delegate it to the clerk. The statute implies that the bond must be approved by him, but this approval may be inferred—as, for instance, where it appeared on the face of the bond that the sureties had justified before the judge.[82] This provision as to the bond is directory only, not jurisdictional, and the Supreme Court itself may give an opportunity to execute and file a proper bond after the case has been taken there.[83]

The character of bonds to be given is regulated by Supreme Court rule 29,[84] which reads as follows: "Supersedeas bonds in the district courts and circuit courts of appeals must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value

[82] Silver v. Ladd, 6 Wall. 440, 18 L. Ed. 828; O'Reilly v. Edrington, 96 U. S. 724, 24 L. Ed. 659; Haskins v. St. Louis & S. E. R. Co., 109 U. S. 107, 3 Sup. Ct. 72, 27 L. Ed. 873. *See "Appeal and Error," Dec. Dig. (Key-No.) § 386; Cent. Dig. §§ 2059–2063.*

[83] Davidson v. Lanier, 4 Wall. 447, 18 L. Ed. 377; Brown v. McConnell, 124 U. S. 489, 8 Sup. Ct. 559, 31 L. Ed. 495; Stewart v. Masterson, 124 U. S. 493, 8 Sup. Ct. 561, 31 L. Ed. 507. *See "Appeal and Error," Dec. Dig. (Key-No.) § 386; Cent. Dig. §§ 2059–2063.*

[84] 32 Sup. Ct. xii.

thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal."

Any wording, however, which is practically the equivalent of this, makes the bond good.[35]

The bond should be payable to the defendants in error of record.[36]

A supersedeas under these provisions in a common-law case is only allowed as incident to a writ of error, and cannot be allowed until the writ of error is issued.[37]

The supersedeas is, in its origin and nature, simply intended to stop execution on the judgment rendered in the case appealed from. It cannot prevent the bringing of similar suits or any other action.[38]

SAME—APPEAL

195. An appeal is a process borrowed from the civil law, and differs from the writ of error, in that it brings up all questions both of law and fact. It is the regular process in all cases not falling under the classification of common-law cases, the most important branches being equity and admiralty cas-

[35] Gay v. Parpart, 101 U. S. 391, 25 L. Ed. 841. *See "Appeal and Error," Dec. Dig. (Key-No.) § 384; Cent. Dig. §§ 2049–2056.*

[36] Davenport v. Fletcher, 16 How. 142, 14 L. Ed. 879. *See "Appeal and Error," Dec. Dig. (Key-No.) § 376; Cent. Dig. §§ 2011–2016.*

[37] In re Ralston, 119 U. S. 613, 7 Sup. Ct. 317, 30 L. Ed. 506. *See "Appeal and Error," Dec. Dig. (Key-No.) § 459; Cent. Dig. §§ 2218–2221.*

[38] Hovey v. McDonald, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. Ed. 888; Natal v. Louisiana, 123 U. S. 516, 8 Sup. Ct. 253, 31 L. Ed. 233. *See "Appeal and Error," Dec. Dig. (Key-No.) § 490; Cent. Dig. §§ 2264–2274.*

es. A habeas corpus proceeding is also reviewable by appeal, though that is a common-law writ; the statute expressly requiring that it shall be reviewable in this manner.[39]

The Supreme Court has described as follows the difference between an appeal and a writ of error: "An appeal to this court in a proper case is matter of right, and its allowance is in reality nothing more than the doing of those things which are necessary to give the appellant the means of invoking our jurisdiction. A writ of error is a process of this court, and it is issued, therefore, only upon our authority; but an appeal can be taken without any action by this court. All that need be done to get an appeal is for the appellant to cite his adversary in a proper way to appear before this court, and for him to docket the case here at the proper time. Such a citation as is required may be signed by a judge of the circuit court from which the appeal is taken, or by a justice of this court." [40]

Section 1012 of the Revised Statutes [41] provides as follows: "Appeals from the circuit courts and district courts acting as circuit courts, and from district courts in prize causes, shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error."

Under this provision the method of taking an appeal is substantially the same as that already described. There must be a properly authenticated transcript of the record, an assignment of error, and a prayer for reversal. The allowance of an appeal, however, is not of itself a writ, like the issuing of a writ of error by the clerk. It is usually al-

[39] Rev. St. §§ 763, 765 (U. S. Comp. St. 1901, pp. 594, 596).

[40] Brown v. McConnell, 124 U. S. 489, 490, 491, 8 Sup. Ct. 559, 31 L. Ed. 495. *See "Appeal and Error," Dec. Dig. (Key-No.) § 405; Cent. Dig. §§ 2120–2122.*

[41] U. S. Comp. St. 1901, p. 716.

lowed somewhat in the following language, indorsed at the end of the petition and prayer for reversal:

"Appeal allowed as prayed for, bond in the penalty of $.....

".....,

"..... Judge."

How and by Whom Allowed

Appeals to the Supreme Court from the district courts are allowed by the same judges who would allow writs of error under similar circumstances, and bonds and other steps necessary in perfecting the appeal are taken and given in the same way. There is, however, one important difference between perfecting cases by appeal, and perfecting them by writ of error. As has been already seen, a citation is necessary on a writ of error, though asked in open court during the term at which the judgment complained of was rendered. But when an appeal is taken and perfected in open court, a citation is not necessary, for the appeal differs from the writ of error in being the act of the parties instead of the court; and, when taken in open court, all parties are constructively present, and have notice.[42] A citation is necessary, however, though the appeal is taken in open court, if it is not perfected there by giving the necessary bond, for the opposite party is not required to presume that an appeal will be prosecuted, merely from the fact that it is taken.[43] No exact language is necessary in allowing an appeal. In fact, taking security and signing the citation is itself the equivalent of such allowance.[44]

[42] Sage v. Central R. Co., 96 U. S. 712, 24 L. Ed. 641; Dodge v. Knowles, 114 U. S. 430, 5 Sup. Ct. 1197, 29 L. Ed. 144. *See "Appeal and Error," Dec. Dig. (Key-No.) § 397; Cent. Dig. § 2101.*

[43] Hewitt v. Filbert, 116 U. S. 142, 6 Sup. Ct. 319, 29 L. Ed. 581; Jacobs v. George, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127. *See "Appeal and Error," Dec. Dig. (Key-No.) § 397; Cent. Dig. § 2101.*

[44] Brandies v. Cochrane, 105 U. S. 262, 26 L. Ed. 989. *See "Appeal and Error," Dec. Dig. (Key-No.) § 365; Cent. Dig. §§ 1784, 1977–1988.*

The obtaining of a supersedeas does not suspend all decrees. There are some which, from their intrinsic nature, are not suspended by a supersedeas, which is really a common-law writ intended to stay execution on a judgment.

Under these circumstances, the lower court, when an appeal is asked, should be requested to enter some order itself operating as a stay of all proceedings—a request which any court will grant if occasion requires. Its action, however, in granting or refusing such a request is largely discretionary; and the appellate court will not interfere unless in a very plain case, where it is patent that a failure to do so would prevent the appellant from reaping the fruits of his victory, and prevent the appellate court from being able to carry out its decisions.[45] In fact, the Supreme Court and the circuit courts of appeals under the powers given by section 262 of the Judicial Code, which authorizes them to issue any writs necessary for the protection of their jurisdiction, could issue a writ of supersedeas direct for the purpose of protecting a litigant, though the exercise of this power is rare.[46]

Appeals from the Circuit Court of Appeals

The time of review by the Supreme Court of decisions of the circuit court of appeals is limited by the concluding paragraph of the sixth section of the act of March 3, 1891,[47] to one year after the entry of the order sought to be reviewed. Here, too, only final decisions of the circuit court of appeals are reviewable by the Supreme Court. A decision of a circuit court of appeals merely affirming an or-

[45] Goddard v. Ordway, 94 U. S. 672, 24 L. Ed. 237; Hovey v. McDonald, 109 U. S. 159, 3 Sup. Ct. 136, 27 L. Ed. 888. *See "Appeal and Error," Dec. Dig. (Key-No.) § 458; Cent. Dig. §§ 2223, 2224.*

[46] In re McKenzie, 180 U. S. 536, 21 Sup. Ct. 468, 45 L. Ed. 657. *See "Appeal and Error," Dec. Dig. (Key-No.) § 458; Cent. Dig. §§ 2223, 2224.*

[47] 26 Stat. 828, c. 517 (U. S. Comp. St. 1901, p. 550). In view of the concluding paragraph of section 297 of the Judicial Code this must be deemed still in force.

der which awarded a temporary injunction is not such a final order.[48] A decision of such court directing a circuit court to remand a case to the state court which had been improperly removed is not final.[49] A decision reversing a case and remanding it for a new trial is not a final order.[50] The principle controlling the question whether the decisions of an appellate court are final decisions or not is expressed by the Supreme Court thus: "A decree, to be final for the purposes of appeal, must leave the case in such a condition that, if there be an affirmance in this court, the court below will have nothing to do but execute the decree it has already entered." [51]

Hence a decree dismissing a bill in equity as to one defendant who had demurred, but leaving the case undisposed of as to other defendants who had answered, though final as to the parties dismissed, is not a final decree in the sense in which it is used in connection with appeals, and an appeal cannot be taken from it until the final disposition of the entire case.[52]

[48] KIRWAN v. MURPHY, 170 U. S. 205, 18 Sup. Ct. 592, 42 L. Ed. 1009. *See "Courts," Dec. Dig. (Key-No.) § 382; Cent. Dig. § 1020.*

[49] German Nat. Bank v. Speckert, 181 U. S. 405, 21 Sup. Ct. 688, 45 L. Ed. 926. *See "Courts," Dec. Dig. (Key-No.) § 382; Cent. Dig. § 1020.*

[50] Montana Min. Co. v. St. Louis Min. & Mill. Co., 186 U. S. 24, 22 Sup. Ct. 744, 46 L. Ed. 1039. *See "Courts," Dec. Dig. (Key-No.) § 382; Cent. Dig. § 1020.*

[51] National Bank of Rondout v. Smith, 156 U. S. 330, 15 Sup. Ct. 358, 39 L. Ed. 441. This was an appeal from a decree of a circuit court, but the principle is the same. *See "Courts," Dec. Dig. (Key-No.) § 382; Cent. Dig. § 1020.*

[52] Id.

SAME—OTHER METHODS

196. In addition to writ of error and appeal, the law allows reviews of the decisions of the circuit court of appeals in certain cases by means of certificate from that court to the Supreme Court, and by certiorari from the Supreme Court to the circuit court of appeals.

Reviews of the decisions of the territorial and other miscellaneous courts are generally by appeal or writ of error, in accordance with regulations prescribed by law for those cases.

The Different Kinds of Process Used in Taking Cases from Circuit Courts of Appeals to the Supreme Court—Certificate

The first method used is by certificate. It has been seen [58] that the circuit court of appeals may certify to the Supreme Court any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. This is the act of the court itself, without any motion for such certificate on the part of the parties; and hence no process or allowance of appeals, or anything of that sort, need be resorted to. The same section goes on to provide that on such certificate the Supreme Court may either give its instruction on the questions and propositions certified, which shall be binding on the circuit court of appeals, or it may require that the whole record in the cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

The language of this section implies that this action on the part of the Supreme Court is also the act of the court,

[58] Ante, p. 514; Judicial Code, § 239.

and not of the parties, and requires nothing more than an order of some sort from the Supreme Court to the circuit court of appeals. But the second paragraph of Supreme Court rule 37 provides: [54]

"If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record."

This implies that the Supreme Court will listen to applications by the parties to have the whole record sent up, and it is presumed that in such case they would proceed as if on motion, making the application in the form of a printed motion accompanied by reasons therefor, and furnishing the record as above required, and preferably giving the opposite party notice. There can be no doubt, however, under the language of the statute itself, that the Supreme Court can require the whole record to be sent up to it of its own motion, and without any act of the parties.

Same—Certiorari

The next process by which cases may be taken from the circuit court of appeals to the Supreme Court is by certiorari. This is provided by section 240 of the Judicial Code. Paragraph 3 of the thirty-seventh Supreme Court rule provides as follows:

"Where application is made to this court to require a case to be certified to it for its review and determination, a certified copy of the entire record of the case in the circuit court of appeals shall be furnished to this court by the applicant as part of the application."

The method of making this application is the same as the method of making any motion in the Supreme Court. Reasonable notice should be given to the adverse parties. The motion should be printed, including therein the notice and proof of service, and the record should be annexed.

[54] 32 Sup. Ct. xiv.

No oral argument is permitted, and therefore the motion or petition for the writ should contain a sufficient statement of the case to show the Supreme Court that this extraordinary remedy should be permitted, or, if not in the petition, an independent brief should be filed, showing as briefly as possible the same thing. It is better to refrain in the brief from discussing the questions at issue any more than is necessary to make a prima facie case, for, if the writ is granted, there will still be opportunity to file an elaborate brief.

In case the litigant thinks when he goes to the circuit court of appeals that his case may eventually go by certiorari to the Supreme Court, it is best to have an extra number of copies of the record printed, so as to use them in the Supreme Court. One would have to be certified as an original record, and the remainder can usually be utilized, for the style, size, and type of records in the circuit court of appeals are about the same as those required by the rules of the Supreme Court.[55]

Same—Writ of Error

The third method of taking cases from the circuit courts of appeals to the Supreme Court is by writ of error. This takes up the same character of cases that have been described in connection with appeals from the circuit courts. The last part of section 11 of the act of March 3, 1891,[56] provides:

"* * * All provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in re-

[55] Act Feb. 13, 1911, c. 47, 36 Stat. 901 (U. S. Comp. St. Supp. 1911, p. 275), to diminish expenses of appellate proceedings, allows this as a matter of right.

[56] 26 Stat. 829, c. 517 (U. S. Comp. St. 1901, p. 552). The last part of this is carried into section 132 of the Judicial Code; but, in view of the last paragraph of section 297 of that Code, the entire provision above quoted must still be in force.

spect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively."

A writ of error from the Supreme Court to the circuit court of appeals can be issued by the clerk of the district court, the clerk of the circuit court of appeals, or by the clerk of the Supreme Court. It can be allowed and the citation issued by any judge competent to sit in the circuit court of appeals, or by a justice of the Supreme Court.

The fourth method of taking cases from the circuit court of appeals to the Supreme Court is by appeal. Such an appeal can be allowed by any of the judges of either court, and the citation signed by such judges.

Review of Decisions of Territorial Courts, or Courts of the Dependencies

In those cases of which the Supreme Court has jurisdiction, the review is by writ of error or appeal, according to the nature of the case.[57]

Review of Decisions of the Court of Appeals of the District of Columbia

The method of review in this case also is by writ of error or appeal.[58] There have been some interesting decisions on appeals from this court in relation to the character of judgments which are final, and, as it is an intermediate

[57] Idaho & O. Land Imp. Co. v. Bradbury, 132 U. S. 509, 10 Sup. Ct. 177, 33 L. Ed. 433; Judicial Code, §§ 244–249. *See "Courts," Dec. Dig. (Key-No.) § 387; Cent. Dig. §§ 1032–1037; "Appeal and Error," Cent. Dig. §§ 308, 3397.*

[58] Judicial Code, § 250. Under section 251 questions may be certified up or the Supreme Court may require the whole case to be sent up as in case of the circuit courts of appeals.

court somewhat similar to the circuit courts of appeals, they are in point in that connection also. For instance, a decision of this court reversing the lower court, and directing the entry of a decree granting an injunction on final hearing, has been held to be a final decree, as it leaves practically nothing to the lower court but the ministerial act of enforcing the decree.[59] On the other hand, a decision reversing the inferior court in a condemnation proceeding, and remanding the case, with instructions to proceed as directed by the act of Congress, is not a final decree.[60]

Review of Decisions of the Court of Claims

This is by appeal only, under the provisions of section 242 of the Judicial Code.

Review of Decisions of the Commerce Court

This, too, is by appeal only,[61] under section 210 of the Judicial Code.

Review of Decisions of the State Courts—Time of Taking

Section 1008 of the Revised Statutes [62] prescribes a period of two years for writs of error or appeals from a circuit or district court. Section 1003 [63] provides as follows: "Writs of error from the Supreme Court to a state court in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

[59] CHESAPEAKE & POTOMAC TEL. CO. v. MANNING, 186 U. S. 238, 22 Sup. Ct. 881, 46 L. Ed. 1144. *See "Courts," Dec. Dig. (Key-No.) § 388; Cent. Dig. §§ 1038–1040; "Appeal and Error," Cent. Dig. §§ 309, 334.*

[60] Macfarland v. Brown, 187 U. S. 239, 23 Sup. Ct. 105, 47 L. Ed. 159. See, also, Macfarland v. Byrnes, 187 U. S. 246, 23 Sup. Ct. 107, 47 L. Ed. 162. *See "Courts," Dec. Dig. (Key-No.) § 388; Cent. Dig. §§ 1038–1040; "Appeal and Error," Cent. Dig. §§ 309, 334.*

[61] Act March 3, 1911, c. 231, 36 Stat. 1150 (U. S. Comp. St. Supp. 1911, p. 218), repealed October 22, 1913; post, p. 701.

[62] U. S. Comp. St. 1901, p. 715.

[63] U. S. Comp. St. 1901, p. 713.

Under these two provisions, taken together, the limitation on writs of error to the state courts is two years.

Same—Character of Decisions Reviewable

Here, too, only final decisions of the state courts are reviewable. A great many decisions have been rendered on tne question what constitutes a final decision under such circumstances. The test applied by the Supreme Court is as follows: "The rule is well settled and of long standing that the judgment or decree, to be final, within the meaning of that term in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered." [64]

But a decision of a state appellate court reversing a decision of the inferior court which had sustained a demurrer and remanding the case, with instructions to overrule the demurrer and permit the case to proceed, is not a final judgment, although it may adjudicate the principles of the case. In such case it is necessary to let the case proceed in the lower court to final judgment, and then take a new appeal to the state appellate court, though it is a foregone conclusion that this latter court will not consider questions settled by its first appeal. On its affirmance of the judgment in the second appeal, a writ of error can then be taken to it from the Supreme Court, which will bring up the whole case from its inception.[65] So a decision of a state appellate court reversing a case, and remanding it for a

[64] Bostwick v. Brinkerhoff, 106 U. S. 3, 1 Sup. Ct. 15, 27 L. Ed. 73. *See "Courts," Dec. Dig. (Key-No.) § 389; Cent. Dig. §§ 1041–1044.*

[65] GREAT WESTERN TELEGRAPH CO. v. BURNHAM, 162 U. S. 339, 16 Sup. Ct. 850, 40 L. Ed. 991; Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 29 Sup. Ct. 430, 53 L. Ed. 765; Louisiana Nav. Co. v. Oyster Commission of Louisiana, 226 U. S. 99, 33 Sup. Ct. 78, 57 L. Ed. ——. *See "Courts," Dec. Dig. (Key-No.) § 393; Cent. Dig. § 1048.*

new trial or for further proceedings, is not a final judgment; and the character of the judgment must be determined from the language of the judgment itself.[66] So a decision of a state appellate court reversing the decision of the lower court for denying a change of venue, and remanding the case for further proceedings, is not final.[67] But an order of a state appellate court reversing the lower court and remanding the case, with instructions to enter a certain judgment in itself a final judgment, is final.[68] And where a state appellate court is vested by the law of its state with a discretion whether to allow a writ of error or not, and on application it refuses a writ of error on the ground that the judgment below is plainly right, this is itself such a final order of the appellate court as authorizes a writ of error to it from the Supreme Court.[69]

[66] HASELTINE v. CENTRAL NAT. BANK, 183 U. S. 130, 22 Sup. Ct. 49, 46 L. Ed. 117; Missouri & K. I. R. Co. v. Olathe, 222 U. S. 185, 32 Sup. Ct. 46, 56 L. Ed. 155. *See "Courts," Dec. Dig. (Key-No.) § 393; Cent. Dig. §§ 1046–1048.*

[67] Cincinnati St. Ry. Co. v. Snell, 179 U. S. 395, 21 Sup. Ct. 205, 45 L. Ed. 248. *See "Courts," Dec. Dig. (Key-No.) § 393; Cent. Dig. § 1048.*

[68] Mower v. Fletcher, 114 U. S. 127, 5 Sup. Ct. 799, 29 L. Ed. 117. *See "Courts," Dec. Dig. (Key-No.) § 393; Cent. Dig. §§ 1047, 1048.*

[69] The text states the correct principle in the judgment of the author, but it must be admitted that the decisions are not clear. The question has arisen on cases coming from the Virginia courts, and the confusion springs from the failure to distinguish between the act of the judge under the Virginia practice and the act of the court. In Gregory v. McVeigh, 23 Wall. 294, 23 L. Ed. 156, the court decided that the writ should run to the corporation court of Alexandria. At that time under the Virginia statute, an application for a writ of error to the state court of appeals could be made either to the court or to one of the judges; but if made to the latter and refused by him as plainly right, it could not then be made to the court. The defeated party had made application to the judge, not to the court, and had been refused on the ground that the decision was plainly right. This, being the act of a judge, did not go on the records of the state appellate court, and hence the only judgment to appeal from was that of the lower court; so that this case is perfectly clear. Then came Williams v. Bruffy, 96 U. S. 176, 24 L. Ed. 716; Id., 102 U. S. 248, 26 L. Ed. 135. Here the party de-

Process of Review

These cases can be taken to the Supreme Court by writ of error only, as only questions of law are reviewable.[70] The writ of error can be issued by the clerk of the district court or of the circuit court of appeals, which includes the

feated in the lower court applied to the state court of appeals and not to a judge, and the court refused the writ on the ground that the decision was plainly right, and this order was entered on its records. The Supreme Court held that this was the equivalent of an order of affirmance, for the reason that the record disclosed no error, and that therefore its writ should go to the state court of appeals and not to the lower court, and that such order of the state appellate court was a final decree. As the record remained in the state appellate court and the order went upon its minute book, the reasoning in this case seems to the author conclusive.

Since these two decisions the Virginia statute has been changed, so that now under sections 3465–3467, Code 1904, a litigant defeated in the lower court can not only apply to the individual judges of the state appellate court, but if they refuse he can apply to the court at its next term; and until he does this he has not exhausted his chances of review. The action of the court in refusing his application on the ground that the decision of the lower court was plainly right is taken on a transcript of the record filed with it, and its order refusing the writ goes on its records. It must imply an examination and approval of the decision. It is not the language of a refusal to take jurisdiction; for a court that has no jurisdiction has no call to express an opinion on the merits.

Recently, however, in Western Union Tel. Co. v. Crovo, 220 U. S. 364, 31 Sup. Ct. 399, 55 L. Ed. 498, where the order of the state appellate court was exactly the same as in the Williams v. Bruffy Case, the Supreme Court in a sentence, without referring to it or any other authority, said that, as the state appellate court had denied the writ of error, the writ of the Supreme Court should go to the inferior state court. And later, in Norfolk & S. Turnpike Co. v. Virginia, 225 U. S. 264, 32 Sup. Ct. 828, 56 L. Ed. 1082, the Supreme Court served notice on the bar that after that term it would follow the rule laid down in the Crovo Case. This opinion also ignores the Williams v. Bruffy Case.

The question is not one of judicial discretion, but of statutory construction. Notwithstanding the warning, the author believes that when the Supreme Court comes to consider thoroughly the present Virginia statutes, and the fact that the action of the state appellate court is a matter of record, it will be compelled to return to the principle of the Williams v. Bruffy Case. *See "Courts," Dec. Dig. (Key-No.) § 393; Cent. Dig. §§ 1047, 1048.*

[70] Judicial Code, § 237.

territory where the Supreme Court of the state sits, or by the clerk of the Supreme Court.[71] Writs of error in this case may be allowed by the chief justice or presiding judge of the state court, if it is a court of more than one judge, or by any justice of the United States Supreme Court. On this point the Supreme Court has spoken as follows:

"Writs of error to the circuit court, under the twenty-second section of the judiciary act, issue as a matter of course, and can be obtained from the clerk of the circuit court, and, when filed in his office by the party, are duly served; but writs of error to the state courts can only issue when one of the questions mentioned in the twenty-fifth section of that act was decided by the court to which the writ is directed; and, in order that there may be some security that such a question was decided in the case, the statute requires that the citation must be signed by the chief justice or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States. It has been the settled doctrine of this court that a writ of error to a state court must be allowed by one of the judges above mentioned, or it will be dismissed for want of jurisdiction. * * *"[72]

Accordingly, where the writ of error is allowed by one of the associate judges of the state court, it is of no effect.[73] These writs of error differ from those of the circuit court in the important particular that they are not a strict matter of right. Not only in the above quotation, but in other cases, the Supreme Court has said that they must be al-

[71] Sections 1003, 1004, Rev. St. (U. S. Comp. St. 1901, p. 713).

[72] BARTEMEYER v. IOWA, 14 Wall. 26, 20 L. Ed. 792. See, also, Missouri Valley Land Co. v. Weise, 208 U. S. 234, 28 Sup. Ct. 294, 52 L. Ed. 466. *See "Courts," Dec. Dig. (Key-No.) § 397; Cent. Dig. §§ 1081–1084.*

[73] Butler v. Gage, 138 U. S. 52, 11 Sup. Ct. 235, 34 L. Ed. 869; Havnor v. New York, 170 U. S. 408, 18 Sup. Ct. 631, 42 L. Ed. 1087. *See "Courts," Dec. Dig. (Key-No.) § 397; Cent. Dig. §§ 1081–1084.*

lowed by one of the judges above named, as some security that a federal question of the character contemplated is involved in the case.[74]

The return of these writs of error is regulated by the eighth rule of the Supreme Court, under which the clerk to which the writ of error is directed makes return by transmitting a true copy of the record and all the accompanying papers under his hand and the seal of the court. He must include in this the opinion of the lower court. Under section 999 of the Revised Statutes,[75] the citation in this case must be signed by the chief justice or judge or chancellor of the state court rendering the judgment or passing the decree complained of, or by a justice of the Supreme Court of the United States, and the opposite party must have at least thirty days' notice.

Under section 1000 of the Revised Statutes,[76] the justice or judge signing the citation has power to take the proper bond. In order for this bond to operate as a supersedeas, the writ of error must be served by lodging a copy for the adverse party in the clerk's office where the record remains within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. The record must show that this has been done.[77] The steps necessary to properly take a case from the state court of last resort to the Supreme Court are therefore as follows:

1. Prepare the assignment of errors and the petition for the writ of error. These are papers of the state court, and

[74] Gleason v. Florida, 9 Wall. 779, 19 L. Ed. 730; Spies v. Illinois, 123 U. S. 131, 8 Sup. Ct. 22, 31 L. Ed. 80. *See "Courts," Dec. Dig. (Key-No.) § 397; Cent. Dig. §§ 1081–1084.*

[75] U. S. Comp. St. 1901, p. 712.

[76] U. S. Comp. St. 1901, p. 712.

[77] Rev. St. § 1007 (U. S. Comp. St. 1901, p. 714); O'Dowd v. Russell, 14 Wall. 402, 20 L. Ed. 857; Boise County v. Gorman, 19 Wall. 661, 22 L. Ed. 226. *See "Courts," Dec. Dig. (Key-No.) § 398; Cent. Dig. §§ 1085–1088.*

should be entitled in the state court. They can be signed by counsel.

2. Get the presiding judge of the state court to allow the writ of error. A Supreme Court justice could also do it, but ordinarily the judge of the state court is more accessible. The allowance can be indorsed at the foot of the petition for the writ of error, somewhat in the following language:

"Writ of error allowed upon the execution of a bond by in the sum of $..... Said bond, when approved, to act as a supersedeas.

"Dated.....

".....

"Chief Justice of....."

Care should be taken to see that the signature of the judge shows that he is the chief justice or presiding judge.

3. Execute the bond with proper acknowledgments and justifications, and have the chief justice approve it. The usual way of doing this is simply to write at the bottom of it: "Approved., Chief Justice of"

4. Get the clerk of the United States district court for the district, or the clerk of the circuit court of appeals, to issue the writ of error, and have the presiding judge of the state court indorse at the bottom: "Allowed., Chief Justice of....."

5. Have the citation signed by the chief justice of the state court, and attested by the clerk of that court.

6. Have the citation served, or service acknowledged.

7. Take these various papers, leave the original assignment of errors, petition for writ of error, allowance, and bond, in the state court, have copies of these papers made and attach them to the transcript of the record; attach also to the transcript the original writ of error and the original citation, with proof of service; have the clerk of

the state court certify that the original of the bond was lodged in his office, and that the original writ of error was lodged there on a given date, and a copy for each one of the defendants in error (naming them), and then have him certify all the papers as follows:

"Return to Writ of Error.

"In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within-entitled cause, with all things concerning the same.

"Witness my hand and the seal of the Supreme Court of this day of"

8. Send these papers to the clerk of the Supreme Court, with an entry of appearance, and, last but not least, a check for $25.

REVIEW BY THE CIRCUIT COURT OF APPEALS

197. Review by the circuit court of appeals of decisions in the cases over which it exercises appellate jurisdiction is had by means of writ of error or appeal in accordance with the general principles governing these methods.

Only final decisions of the lower courts can be made the subject of this appellate review, except that appeals are allowed by law in certain interlocutory decrees or orders granting, continuing, refusing or dissolving injunctions, or appointing receivers, provided certain requirements prescribed by the statute be followed in the prosecution of such reviews.

Method of Maturing Cases in the Circuit Courts of Appeals—From the District and Circuit Courts

The time of taking these appeals is limited by the eleventh section of the act of March 3, 1891,[78] to six months after the entry of the order complained of, except where "a lesser time is now by law limited for appeals or writs of error."

Instances of such lesser time are appeals from certain interlocutory decrees, which are limited to thirty days, and appeals under section 25 of the bankrupt act, which are limited to ten days.

Character of Decisions Reviewable

Here, too, the general rule is that only final decisions are reviewable, and the authorities heretofore quoted are applicable as indicating what are final decisions; but there is one important exception, in case of review of decisions of district and circuit courts by the circuit court of appeals. It is provided by section 129 of the Judicial Code, which reads as follows: "Where upon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the circuit court of appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: Provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the appellate court,

[78] U. S. Comp. St. 1901, p. 552.

or a judge thereof, during the pendency of such appeal: Provided, however, that the court below may, in its discretion, require as a condition of the appeal an additional bond."

The hardships of injunction or receivership orders constitute the reason for making an exception to the general rule of appellate proceedings allowing only final decrees to be reviewed.

An order appointing a receiver, though ex parte, is appealable, under this provision.[79] So, too, an order confirming the appointment of a receiver.[80]

When a case is taken to the circuit court of appeals under this provision, the latter court has the power, in its discretion, to consider the whole case, and enter a final decree in it, if it thinks the case one in which it should exercise this power.[81] In such appeals it is discretionary with the lower court whether to suspend the order of injunction or the appointment of a receiver. The language of the act speaking of suspending proceedings "in other respects" was not intended to imply that the lower court could not suspend in these respects also.[82]

Process of Review

This may be by writ of error or appeal, according to the nature of the case. The writ of error under the provisions of section 11, already quoted, can be issued by the clerk of the district court or the clerk of the circuit court of appeals; and the judge of either the higher or lower court

[79] Joseph Dry Goods Co. v. Hecht, 120 Fed. 760, 57 C. C. A. 64. *See "Courts," Dec. Dig. (Key-No.) § 405; Cent. Dig. §§ 1097–1103.*

[80] Pacific Northwest Packing Co. v. Allen, 109 Fed. 515, 48 C. C. A. 521. *See "Courts," Dec. Dig. (Key-No.) § 405; Cent. Dig. §§ 1097–1103.*

[81] Smith v. Vulcan Iron Works, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810; Metropolitan Water Co. v. Kan. Valley Drainage Dist. of Wyandotte County, 223 U. S. 519, 32 Sup. Ct. 246, 56 L. Ed. 533. *See "Courts," Dec. Dig. (Key-No.) § 405; Cent. Dig. §§ 1097–1103.*

[82] In re McKenzie, 180 U. S. 536, 550, 21 Sup. Ct. 468, 45 L. Ed. 657. *See "Courts," Dec. Dig. (Key-No.) § 405.*

can allow the appeal or writ of error, approve the bond, sign the citation, and do all other acts necessary to perfect the appeal.[83]

Review of Decisions of Territorial Courts

The cases from these courts which are reviewable by the circuit court of appeals are taken up by writ of error or appeal, according to their nature.[84]

TRIAL IN THE APPELLATE COURTS

198. Trials in the appellate courts are governed by rules prescribed by them under authority of law.

The first step necessary is docketing the case. In the Supreme Court this is regulated by rule 9, and it must be docketed by the return day. Substantially similar rules prevail in all the circuit courts of appeals. The next step necessary is to have the record printed. An estimate of the cost is furnished by the clerk, and the appellant must deposit the necessary funds. In the Supreme Court he must also deposit twenty-five dollars on the entry of his appearance, and most, if not all, of the circuit courts of appeals have a similar rule.

Further Proof

The general rule as to appellate proceedings is that the case is heard on the record coming from the lower court, which is printed in advance of the hearing. There are a few cases in which further proof can be taken in the appellate court. The most important of these are admiralty cases. These cases go to the circuit courts of appeals ordinarily, and in some of the circuits, as in the First and Second Circuits, the matter of further proof is regulated by

[83] Tornanses v. Melsing, 106 Fed. 775, 45 C. C. A. 615; In re McKenzie, 180 U. S. 536, 550, 21 Sup. Ct. 468, 45 L. Ed. 657. *See "Courts," Dec. Dig. (Key-No.) § 405.*

[84] Judicial Code, §§ 128, 131, 134, 135.

rule. In many there is no express rule on the subject, but the principle is about the same, and it corresponds with the principle which formerly governed the taking of proof in such cases in the Supreme Court. That principle is that it was only allowed where it was impossible to have the proof in the lower court—such as cases of after-discovered evidence or loss of evidence. Unless this principle were applied, courts would constantly find an entire new case made in the appellate court.[85] Rule 12 of the Supreme Court and section 698 of the Revised Statutes [86] also provide for taking new proof in admiralty in the Supreme Court. The rule and the statute were both in force before the act conferring final jurisdiction in admiralty cases on the circuit court of appeals; but, if an admiralty case should be taken to the Supreme Court—as, for instance, where it involved a constitutional and jurisdictional question—or went up by certiorari, there is no reason why this rule and statute would not still prevail, and permit the taking of new evidence in the Supreme Court when the circumstances justified it.

Briefs

The Supreme Court and circuit court of appeals, while permitting oral argument, require printed arguments or briefs to be filed in advance of the calling of the case on the docket. The appellant's brief is required by Supreme Court rule 21 [87] to contain a specification of the errors relied on, and various other information, rendering it easy for the judges to find out the issues involved without the necessity of constant reference to the record. Similar rules apply in the circuits. The preparation of the brief is the most responsible part of the work in the appellate courts. In these courts special care should be taken to present the facts, and

[85] The Mabey, 10 Wall. 419, 19 L. Ed. 963. *See "Admiralty," Dec. Dig. (Key-No.) § 117; Cent. Dig. § 754.*

[86] U. S. Comp. St. 1901, p. 568.

[87] 32 Sup. Ct. x.

only the necessary facts, as clearly as possible, and in the discussion of questions of law the brief should not be padded with a great mass of references. One or two pointed cases on each point will have more effect than a multitude. If the judges of any appellate court were to read every single case referred to in every single brief during any one term, there is hardly a book in their library which they would not have to handle two or three times over.

In case of defeat in the appellate court, a rehearing may be asked during the term, but cannot be asked after the term.[88] The granting of a rehearing, however, is the exception.

When the appellate court renders its decision, it notifies the inferior court by sending down its mandate. In appeals from the district court to the Supreme Court, the paper goes back to the court of first jurisdiction; and in appeals from the circuit courts of appeals to the Supreme Court, also, the mandate goes direct to the district or circuit court, and not to the circuit court of appeals.[89]

In considering the various statutes referred to which were passed before the abolition of the circuit court and still mention it, the provisions of section 291 of the Judicial Code must be borne in mind. It provides: "Wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts."

[88] Bushnell v. Crooke Mining & Smelting Co., 150 U. S. 82, 14 Sup. Ct. 2, 37 L. Ed. 1007. *See "Courts," Dec. Dig. (Key-No.) § 405.*

[89] Act March 3, 1891, c. 517, § 10, 26 Stat. 829 (U. S. Comp. St. 1901, p. 552).

*

APPENDIX

RULES

OF THE

UNITED STATES SUPREME COURT

1

CLERK

1. The clerk of this court shall reside and keep the office at the seat of the national government, and he shall not practice, either as attorney or counselor, in this court, or in any other court, while he shall continue to be clerk of this court.

2. The clerk shall not permit any original record or paper to be taken from the court room, or from the office, without an order from the court, except as provided by rule 10.

2

ATTORNEYS AND COUNSELORS

1. It shall be requisite to the admission of attorneys or counselors to practice in this court, that they shall have been such for three years past in the highest courts of the states to which they respectively belong, and that their private and professional characters shall appear to be fair.

2. They shall respectively take and subscribe the following oath or affirmation, *viz.:*

I, ——— ———, do solemnly swear (or affirm) that I will demean myself, as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States.

3

PRACTICE

This court considers the former practice of the courts of King's bench and of chancery, in England, as affording outlines for the practice of this court; and will, from time to time, make such alterations therein as circumstances may render necessary.

4

BILL OF EXCEPTIONS

The judges of the district courts in allowing bills of exception shall give effect to the following rules:

1. No bill of exceptions shall be allowed which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise.

5

PROCESS

1. All process of this court shall be in the name of the President of the United States, and shall contain the Christian names, as well as the surnames, of the parties.

2. When process at common law or in equity shall issue against a state, the same shall be served on the governor, or chief executive magistrate, and attorney general of such state.

3. Process of subpœna, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and if the defendant, on such service of the subpœna, shall not appear at the return day, the complainant shall be at liberty to proceed *ex parte*.

6

MOTIONS

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. Forty-five minutes on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

4. All motions to dismiss writs of error and appeals, except motions to docket and dismiss under rule 9, must be submitted in the

first instance on printed briefs or arguments. If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief of argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days. Affidavits of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly postpaid, at such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as prima facie evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party.

5. The court in any pending cause will receive a motion to affirm on the ground that it is manifest that the writ or appeal was taken for delay only, or that the questions on which the decision of the cause depend are so frivolous as not to need further argument. The same procedure shall apply to and control such motions as is provided for in cases of motions to dismiss under paragraph 4 of this rule.

6. Although the court upon consideration of a motion to dismiss or a motion to affirm may refuse to grant the motion, it may nevertheless, if the conclusion is arrived at that the case is of such a character as not to justify extended argument, order the cause transferred for hearing to a summary docket. The hearing of the causes on such docket will be expedited, the court providing from time to time for such speedy disposition of the docket as the regular order of business may permit, and on the hearing of such causes one-half hour will be allowed each side for oral argument.

7. The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court. The motion day shall be Monday of each week; and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a case upon the docket.

7

LAW LIBRARY

1. During the session of the court, any gentleman of the bar having a case on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any

one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof, and also $1 per day for each day's detention beyond the limited time.

2. The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, or arguments filed therein.

3. The marshal shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by anyone except the justices of the court.

8

WRIT OF ERROR AND APPEAL, RETURN, AND RECORD

1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

In order to enable the clerk to perform such duty, and for the purpose of reducing the size of transcripts of record in cases brought to this court by appeal or writ of error, by eliminating all papers not necessary to the consideration of the questions to be reviewed, it shall be the duty of the appellant or plaintiff in error or his attorney to file with the clerk of the lower court, together with proof or acknowledgment of service of a copy on the appellee or defendant in error, or his counsel, a præcipe which shall indicate the portions of the record to be incorporated into the transcript of the record on such appeal or writ of error. Should the appellee or defendant in error, or his counsel, desire additional portions of the record incorporated into the transcript of the record to be filed in this court, he shall file with the clerk of the lower court his præcipe also, within ten days thereafter (unless the time shall be enlarged by a judge of the lower court or by a justice of this court), indicating such additional portions of the record desired by him.

The clerk of the lower court shall transmit to this court as the transcript of the record in the case only the portions of the record below designated by both parties as above provided.

The parties or their counsel, however, may agree by written stipulation to be filed with the clerk of the lower court the portions of the record which shall constitute the transcript of record on appeal or writ of error, and the clerk in such case shall transmit only the papers designated in such stipulation.

If this court shall find that portions of the record unnecessary to a proper presentation of the case have been incorporated into the transcript by either party, the court may order that the whole or any part of the clerk's fee for supervising the printing and of the cost of printing the record be paid by the offending party.

2. In all cases brought to this court by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safekeeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day, except in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska, Idaho, Hawaii, and Porto Rico, when the time shall be extended to sixty days, and from the Philippine Islands to one hundred and twenty days.

6. The record in cases of admiralty and maritime jurisdiction, when, under the requirements of law, the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact, and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case.

9

DOCKETING CASES

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may

have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

10

PRINTING RECORDS

1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall make such cash deposit with the clerk for the payment of his fees as he may require, or otherwise satisfy him in that behalf.

2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and supervising the printing, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket, the case shall be dismissed.

3. Upon payment of the amount estimated by the clerk, thirty copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under rule 8, § 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the

amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

7. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of said fees.

9. The plaintiff in error or appellant may, within ninety days after filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, with proof of service of the same on the adverse party. The adverse party, within ninety days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

The fees of the clerk under rule 24, § 7, shall be computed, as at present, on the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof.

11

TRANSLATIONS

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceedings, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will order that a translation be supplied and inserted in the record.

12

FURTHER PROOF.

1. In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any district court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any district court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: Provided, however, that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

13

OBJECTIONS TO EVIDENCE IN THE RECORD

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

14

CERTIORARI

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for certiorari must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

15

DEATH OF A PARTY

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases;

and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error or appellee, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error or appellant, he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: Provided, however, that a copy of every such order shall be printed in some newspaper of general circulation within the state, territory, or district from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in such court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some state or territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some state or territory of the United States, and stating therein the name and character of such representative, and the state or territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous: Provided, however, that a proper citation reciting the

substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing: And provided, also, that in every such case if the representative of the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within time as above required, by the opposite party, the case shall abate: And provided, also, that the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

16

NO APPEARANCE OF PLAINTIFF IN ERROR OR APPELLANT

Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant in error or appellee may have the plaintiff in error or appellant called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance.

17

NO APPEARANCE OF DEFENDANT IN ERROR OR APPELLEE

Where the defendant in error or appellee fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff in error or appellant, and to give judgment according to the right of the case.

18

NO APPEARANCE OF EITHER PARTY

When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff in error or appellant.

19

NEITHER PARTY READY AT SECOND TERM

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

20

PRINTED ARGUMENTS

1. In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term; and, in addition, appeals from the court of claims may be submitted by both parties within thirty days after they are docketed, but not after the first day of April; but thirty copies of the arguments, signed by attorneys or counselors of this court, must be first filed.

2. When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

3. When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the ex parte argument.

4. No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

21

BRIEFS

1. The counsel for plaintiff in error or appellant shall file with the clerk of the court, at least three weeks before the case is called for argument, thirty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in the order here stated—

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be instructions given or instructions refused. When the

error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk thirty printed copies of his argument, at least one week before the case is called for hearing. His brief shall be of like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by § 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.

7. No brief or printed argument, required by the foregoing sections, shall be filed by the clerk unless the same shall be accompanied by satisfactory proof of service upon counsel for the adverse party.

8. Every brief of more than 20 pages shall contain on its front fly leaves a subject index with page references, the subject index to be supplemented by a list of all cases referred to, alphabetically arranged, together with references to pages where cases are cited.

22

ORAL ARGUMENTS

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. One and one-half hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. But in cases certified from the circuit courts of appeals, cases involving solely the jurisdiction of the court below, and cases under the act of March 2, 1907, 34 Stat. 1246, forty-five minutes only on each side will be allowed for the argument unless the time be extended. The time thus allowed may be apportioned between the counsel on the same side, at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

23

INTEREST

1. In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment is rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed if specially directed by the court.

24

COSTS

1. In all cases where any suit shall be dismissed in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties, except where the dismissal shall be for want of jurisdiction, when the costs incident to the motion to dismiss shall be allowed.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a procedendo, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

7. In pursuance of the act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, $5.

For entering an appearance, 25 cents.

For entering a continuance, 25 cents.

For filing a motion, order, or other paper, 25 cents.

For entering any rule, or for making or copying any record or other paper, 20 cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, $1.

For entering a judgment or decree, $1.

For every search of the records of the court, $1.

For a certificate and seal, $2.

For receiving, keeping, and paying money in pursuance of any statute or order of court, 2 per cent on the amount so received, kept, and paid.

For an admission to the bar and certificate under seal, $10.

For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, 15 cents per folio; but when the necessary printed copies of the record, as printed for the use of the lower court, shall be furnished, the fee for supervising shall be 5 cents per folio.

For making a manuscript copy of the record, when required under rule 10, 20 cents per folio, but nothing in addition for supervising the printing.

For issuing a writ of error and accompanying papers, $5.

For a mandate or other process, $5.

For filing briefs, $5 for each party appearing.

For every printed copy of any opinion of the court or any justice thereof, certified under seal, $2.

25

OPINIONS OF THE COURT

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be printed. And it shall be the duty of the clerk to cause the same to be forthwith printed, and to deliver a copy to the reporter as soon as the same shall be printed.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded.

26

CALL AND ORDER OF THE DOCKET

1. The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the case shall be continued to the next term of the court unless some good and satisfactory reason to the contrary shall be shown to the court.

2. Ten cases only shall be considered as liable to be called on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

3. Criminal cases may be advanced by leave of the court on motion of either party.

4. Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.

5. Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, or which may be entitled to precedence under the provisions of any act of Congress, may also by leave of the court be advanced on motion of the Attorney General.

6. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.

7. No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court.

8. Two or more cases, involving the same question, may, by the leave of the court, be heard together, but they must be argued as one case.

9. If, after a case has been passed, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the case shall then be by him reinstated for call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the case, and it shall then be assigned to such place upon the docket as the court may direct.

10. No stipulation to pass a case will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court.

27

ADJOURNMENT

The court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon, and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

28

DISMISSING CASES IN VACATION

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall in vacation, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

29

SUPERSEDEAS

(See ante, p. 557.)

30

REHEARING

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed and briefly and distinctly

state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

31

FORM OF PRINTED RECORDS AND BRIEFS

All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume; and, as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper.

32

WRITS OF ERROR AND APPEALS IN CASES INVOLVING JURISDICTION OF LOWER COURT

Cases brought to this court by writ of error or appeal, where the only question in issue is the question of the jurisdiction of the court below, will be advanced on motion, and heard under the rules prescribed by rule 6, in regard to motions to dismiss writs of error and appeals.

33

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least one month before the case is heard or submitted.

2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them or make such other disposition of them as to him may seem best.

34

CUSTODY OF PRISONERS ON HABEAS CORPUS

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

35

ASSIGNMENT OF ERRORS

1. See ante, p. 552.

2. The plaintiff in error or appellant shall cause the record to be printed, according to the provisions of §§ 2, 3, 4, 5, 6, and 9, of rule 10.

36

APPEALS AND WRITS OF ERROR FROM DISTRICT COURTS

1. See ante, p. 551.

2. Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under section 238, the district court, or any judge thereof, or any justice of this court, or any circuit judge assigned to the district court, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

37

CASES FROM CIRCUIT COURTS OF APPEALS

1. See ante, p. 516.

2. If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record.

"3. Where an application is submitted to this court for a writ of certiorari to review a decision of a Circuit Court of Appeals or any other court, it shall be necessary for the petitioner to furnish as an exhibit to the petition a certified copy of the entire transcript of record of the case, including the proceedings in the court to which the writ of certiorari is asked to be directed. The petition shall contain only a summary and short statement of the matter involved and the general reasons relied on for the allowance of the writ. A failure to comply with this provision will be deemed a sufficient reason for denying the petition. Thirty printed copies of such petition

and of any brief deemed necessary shall be filed. Notice of the date of submission of the petition, together with a copy of the petition and brief, if any, in support of the same shall be served on the counsel for the respondent at least two weeks before such date in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which cases the time shall be at least three weeks. The brief for the respondent, if any, shall be filed at least three days before the date fixed for the submission of the petition. Oral argument will not be permitted on such petitions, and no petition will be received within three days next before the day fixed upon for the adjournment of the court for the term."

38

INTEREST, COSTS, AND FEES

The provisions of rules 23 and 24 of this court, in regard to interest and costs and fees, shall apply to writs of error and appeals and reviews under the provisions of §§ 238, 239, 240, and 241 of the act entitled, "An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary," approved March 3, 1911, chapter 231.

39

MANDATES

Mandates shall issue as of course after the expiration of thirty days from the day the judgment or decree is entered, unless the time is enlarged by order of the court, or of a justice thereof when the court is not in session, but during the term.

40

PRACTICE IN CASES FROM CIRCUIT COURTS OF APPEALS

The provisions of these rules relating to the practice on direct writs of error to and appeals from the district courts shall also be deemed to relate to and cover the practice on writs of error to and appeals from the circuit courts of appeals.

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RULES OF PRACTICE

FOR THE

COURTS OF EQUITY OF THE UNITED STATES

PROMULGATED BY THE SUPREME COURT OF THE UNITED STATES NOVEMBER 4, 1912

RULE 1

DISTRICT COURT ALWAYS OPEN FOR CERTAIN PURPOSES—ORDERS AT CHAMBERS

The District Courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings preparatory to the hearing upon their merits, of all causes pending therein.

Any District Judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

2

CLERK'S OFFICE ALWAYS OPEN, EXCEPT, ETC.

The clerk's office shall be open during business hours on all days, except Sundays and legal holidays, and the clerk shall be in attendance for the purpose of receiving and disposing of all motions, rules, orders and other proceedings which are grantable of course.

3

BOOKS KEPT BY CLERK AND ENTRIES THEREIN

The clerk shall keep a book known as "Equity Docket," in which he shall enter each suit, with a file number corresponding to the folio in the book. All papers and orders filed with the clerk in the suit, all process issued and returns made thereon, and all appearances shall be noted briefly and chronologically in this book on the folio assigned to the suit and shall be marked with its file number.

The clerk shall also keep a book entitled "Order Book," in which shall be entered at length, in the order of their making, all orders made or passed by him as of course and also all orders made or passed by the judge in chambers.

He shall also keep an "Equity Journal," in which shall be entered all orders, decrees and proceedings of the court in equity causes in term time.

Separate and suitable indices of the Equity Docket, Order Book and Equity Journal shall be kept by the clerk under the direction of the court.

4

NOTICE OF ORDERS

Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order.

5

MOTIONS GRANTABLE OF COURSE BY CLERK

All motions and applications in the clerk's office for the issuing of mesne process or final process to enforce and execute decrees; for taking bills pro confesso; and for other proceedings in the clerk's office which do not require any allowance or order of the court or of a judge, shall be deemed motions and applications grantable of course by the clerk; but the same may be suspended, or altered, or rescinded by the judge upon special cause shown.

6

MOTION DAY

Each District Court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes. If the public interest permits, the senior Circuit Judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district.

7

PROCESS, MESNE AND FINAL

The process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the bill; and, unless otherwise provided in these rules or specially ordered by the court, a writ of attachment and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

8

ENFORCEMENT OF FINAL DECREES

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the District Court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found a writ of sequestration shall issue against his estate, upon the return of non est inventus, to compel obedience to the decree. If a mandatory order, injunction or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him.

9

WRIT OF ASSISTANCE

When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the de-

cree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

10

DECREE FOR DEFICIENCY IN FORECLOSURES, ETC.

In suits for the foreclosure of mortgages, or the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in rule 8 when the decree is solely for the payment of money.

11

PROCESS IN BEHALF OF AND AGAINST PERSONS NOT PARTIES

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, may enforce obedience to such order by the same process as if he were a party; and every person, not being a party, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party.

12

ISSUE OF SUBPŒNA—TIME FOR ANSWER

Whenever a bill is filed, and not before, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which shall contain the names of the parties and be returnable into the clerk's office twenty days from the issuing thereof. At the bottom of the subpœna shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken pro confesso. Where there are more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, or a joint subpœna against all the defendants.

13

MANNER OF SERVING SUBPŒNA

(See ante, p. 434.)

14

ALIAS SUBPŒNA

Whenever any subpœna shall be returned not executed as to any defendant, the plaintiff shall be entitled to other subpœnas against such defendant, until due service is made.

15

PROCESS, BY WHOM SERVED

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court or judge for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

16

DEFENDANT TO ANSWER—DEFAULT—DECREE PRO CONFESSO

It shall be the duty of the defendant, unless the time shall be enlarged, for cause shown, by a judge of the court, to file his answer or other defense to the bill in the clerk's office within the time named in the subpœna as required by rule 12. In default thereof the plaintiff may, at his election, take an order as of course that the bill be taken pro confesso; and thereupon the cause shall be proceeded in ex parte.

17

DECREE PRO CONFESSO TO BE FOLLOWED BY FINAL DECREE—SETTING ASIDE DEFAULT

(See ante, p. 436.)

18

PLEADINGS—TECHNICAL FORMS ABROGATED

Unless otherwise prescribed by statute or these rules the technical forms of pleadings in equity are abolished.

19

AMENDMENTS GENERALLY

(See ante, p. 442.)

20

FURTHER AND PARTICULAR STATEMENT IN PLEADING MAY BE REQUIRED

A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just.

21

SCANDAL AND IMPERTINENCE

The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent or scandalous matter stricken out, upon such terms as the court shall think fit.

22

ACTION AT LAW ERRONEOUSLY BEGUN AS SUIT IN EQUITY —TRANSFER

If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.

23

MATTERS ORDINARILY DETERMINABLE AT LAW, WHEN ARISING IN SUIT IN EQUITY TO BE DISPOSED OF THEREIN

If in a suit in equity a matter ordinarily determinable at law arises, such matters shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court.

24

SIGNATURE OF COUNSEL

Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.

25

BILL OF COMPLAINT—CONTENTS

Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption:

First, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated.

Second, a short and plain statement of the grounds upon which the court's jurisdiction depends.

Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.

Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.

Fifth, a statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If special relief pending the suit be desired the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked.

26

JOINDER OF CAUSES OF ACTION

The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials.

27

STOCKHOLDER'S BILL

(See ante, p. 289.)

28

AMENDMENT OF BILL AS OF COURSE

(See ante, p. 443.)

29

DEFENSES—HOW PRESENTED

(See ante, p. 439.)

30

ANSWER—CONTENTS—COUNTER-CLAIM

(See ante, p. 444.)

31

REPLY—WHEN REQUIRED—WHEN CAUSE AT ISSUE

(See ante, p. 447.)

32

ANSWER TO AMENDED BILL

In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or it is otherwise ordered by a judge of the court; and upon a default, the like proceedings may be had as upon an omission to put in an answer.

33

TESTING SUFFICIENCY OF DEFENSE

(See ante, p. 446.)

34

SUPPLEMENTAL PLEADING

Upon application of either party the court or judge, may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy or a part thereof.

35

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS—FORM

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

36

OFFICERS BEFORE WHOM PLEADINGS VERIFIED

Every pleading which is required to be sworn to by statute, or these rules, may be verified before any justice or judge of any court

of the United States, or of any state or territory, or of the District of Columbia, or any clerk of any court of the United States, or of any territory, or of the District of Columbia, or any notary public.

37

PARTIES GENERALLY—INTERVENTION

Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.

38

REPRESENTATIVES OF CLASS

When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

39

ABSENCE OF PERSONS WHO WOULD BE PROPER PARTIES

(See ante, p. 257.)

40

NOMINAL PARTIES

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpœna upon him, need not appear and answer the bill, unless the plaintiff specially requires him to do so by the prayer; but he may appear and answer at his option; and if he

does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

41

SUIT TO EXECUTE TRUSTS OF WILL—HEIR AS PARTY

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

42

JOINT AND SEVERAL DEMANDS

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

43

DEFECT OF PARTIES—RESISTING OBJECTION

Where the defendant shall by his answer suggest that the bill of complaint is defective for want of parties, the plaintiff may, within fourteen days after answer filed, set down the cause for argument as a motion upon that objection only; and where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order to amend his bill by adding parties; but the court shall be at liberty to dismiss the bill, or to allow an amendment on such terms as justice may require.

44

DEFECT OF PARTIES—TARDY OBJECTION

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties.

45

DEATH OF PARTY—REVIVOR

In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary.

46

TRIAL—TESTIMONY USUALLY TAKEN IN OPEN COURT—RULINGS ON OBJECTIONS TO EVIDENCE

In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules. The court shall pass upon the admissibility of all evidence offered as in actions at law. When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception. If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require.

47

DEPOSITIONS—TO BE TAKEN IN EXCEPTIONAL INSTANCES

The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order. All depositions taken under a statute, or under any such order of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires.

48

TESTIMONY OF EXPERT WITNESSES IN PATENT AND TRADE-MARK CASES

In a case involving the validity or scope of a patent or trade-mark, the district court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony is directed to matters of opinion, be set forth in affidavits and filed as follows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the expiration of the time for filing original affidavits. Should the opposite party desire the production of any affiant for cross-examination, the court or judge shall, on motion, direct that said cross-examination and any re-examination take place before the court upon the trial, and unless the affiant is produced and submits to cross-examination in compliance with such direction, his affidavit shall not be used as evidence in the cause.

49

EVIDENCE TAKEN BEFORE EXAMINERS, ETC.

All evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into the court. Depositions, whether upon oral examination before an examiner or like officer or otherwise, shall be taken upon questions and answers reduced to writing, or in the form of narrative, and the witness shall be subject to cross and re-examination.

50

STENOGRAPHER—APPOINTMENT—FEES

When deemed necessary by the court or officer taking testimony, a stenographer may be appointed who shall take down testimony in shorthand and, if required, transcribe the same. His fee shall be fixed by the court and taxed ultimately as costs. The expense of taking a deposition, or the cost of a transcript, shall be advanced by the party calling the witness or ordering the transcript.

51

EVIDENCE TAKEN BEFORE EXAMINERS, ETC.

Objections to the evidence, before an examiner or like officer, shall be in short form, stating the grounds of objection relied upon, but no transcript filed by such officer shall include argument or debate.

The testimony of each witness, after being reduced to writing, shall be read over to or by him, and shall be signed by him in the presence of the officer; provided, that if the witness shall refuse to sign his deposition so taken, the officer shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. Objection to any question or questions shall be noted by the officer upon the deposition, but he shall not have power to decide on the competency or materiality or relevancy of the questions. The court shall have power, and it shall be its duty, to deal with the costs of incompetent and immaterial or irrelevant depositions, or parts of them, as may be just.

52

ATTENDANCE OF WITNESSES BEFORE COMMISSIONER, MASTER OR EXAMINER

Witnesses who live within the district, and whose testimony may be taken out of court by these rules, may be summoned to appear before a commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in, the court.

In case of refusal of witnesses to attend or be sworn or to answer any question put by the commissioner, master or examiner or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

53

NOTICE OF TAKING TESTIMONY BEFORE EXAMINER, ETC.

Notice shall be given by the respective counsel or parties to the opposite counsel or parties of the time and place of examination before an examiner or like officer for such reasonable time as the court or officer may fix by order in each case.

54

DEPOSITIONS UNDER REV. STAT. §§ 863, 865, 866, 867—CROSS-EXAMINATION

(See ante, p. 450.)

55

DEPOSITION DEEMED PUBLISHED WHEN FILED

Upon the filing of any deposition or affidavit taken under these rules or any statute, it shall be deemed published, unless otherwise ordered by the court.

56

ON EXPIRATION OF TIME FOR DEPOSITIONS, CASE GOES ON TRIAL CALENDAR

After the time has elapsed for taking and filing depositions under these rules, the case shall be placed on the trial calendar. Thereafter no further testimony by deposition shall be taken except for some strong reason shown by affidavit. In every such application the reason why the testimony of the witness cannot be had orally on the trial, and why his deposition has not been before taken, shall be set forth, together with the testimony which it is expected the witness will give.

57

CONTINUANCES

After a cause shall be placed on the trial calendar it may be passed over to another day of the same term, by consent of counsel or order of the court, but shall not be continued beyond the term save in exceptional cases by order of the court upon good cause shown by affidavit and upon such terms as the court shall in its discretion impose. Continuances beyond the term by consent of the parties shall be allowed on condition only that a stipulation be signed by counsel for all the parties and that all costs incurred theretofore be paid. Thereupon an order shall be entered dropping the case from the trial calendar, subject to reinstatement within one year upon application to the court by either party, in which event it shall be heard at the earliest convenient day. If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one.

58

DISCOVERY — INTERROGATORIES — INSPECTION AND PRODUCTION OF DOCUMENTS—ADMISSION OF EXECUTION OR GENUINENESS

The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any

time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge.

If any party to the cause is a public or private corporation, any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit.

Copies shall be filed for the use of the interrogated party and shall be sent by the clerk to the respective solicitors of record, or to the last known address of the opposite party if there be no record solicitor.

Interrogatories shall be answered, and the answers filed in the clerk's office, within fifteen days after they have been served, unless the time be enlarged by the court or judge. Each interrogatory shall be answered separately and fully and the answers shall be in writing, under oath, and signed by the party or corporate officer interrogated. Within ten days after the service of interrogatories, objections to them, or any of them, may be presented to the court or judge, with proof of notice of the purpose so to do, and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. In so far as the objections are sustained, answers shall not be required.

The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his bill dismissed, and, if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer.

By a demand served ten days before the trial, either party may call on the other to admit in writing the execution or genuineness of any document, letter or other writing, saving all just exceptions; and if such admission be not made within five days after such service, the costs of proving the document, letter or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial the court shall find that the refusal or neglect was reasonable.

59

REFERENCE TO MASTER—EXCEPTIONAL, NOT USUAL

Save in matters of account, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it. When such a reference is made, the party at whose instance or for whose benefit it is made shall cause the order of reference to be presented to the master for a hearing within twenty days succeeding the time when the reference was made, unless a longer time be specially granted by the court or judge; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

60

PROCEEDINGS BEFORE MASTER

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed ex parte, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.

61

MASTER'S REPORT—DOCUMENTS IDENTIFIED BUT NOT SET FORTH

In the reports made by the master to the court, no part of any state of facts, account, charge, affidavit, deposition, examination, or answer brought in or used before him shall be stated or recited. But such state of facts, account, charge, affidavit, deposition, examination, or answer shall be identified, and referred to, so as to inform the court what state of facts, account, charge, affidavit, deposition, examination, or answer were so brought in or used.

62

POWERS OF MASTER

The master shall regulate all the proceedings in every hearing before him, upon every reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, viva voce, all witnesses produced by the parties before him, or by deposition, according to the acts of Congress, or otherwise, as here provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

63

FORM OF ACCOUNTS BEFORE MASTER

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party viva voce, or upon interrogatories, as the master shall direct.

64

FORMER DEPOSITIONS, ETC., MAY BE USED BEFORE MASTER

All affidavits, depositions and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.

65

CLAIMANTS BEFORE MASTER EXAMINABLE BY HIM

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or viva voce, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

66

RETURN OF MASTER'S REPORT—EXCEPTIONS—HEARING

The master, as soon as his report is ready, shall return the same into the clerk's office and the day of the return shall be entered by the clerk in the Equity Docket. The parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise.

67

COSTS ON EXCEPTIONS TO MASTER'S REPORT

In order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled, shall, for every exception overruled, pay five dollars costs to the other party, and for every exception allowed shall be entitled to the same costs.

68

APPOINTMENT AND COMPENSATION OF MASTERS

The District Courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof concurring in the appointment), and they may also appoint a master pro hac vice in any particular case. The compensation to be allowed to every master shall be fixed by the District Court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

69

PETITION FOR REHEARING

(See ante, p. 463.)

70

SUITS BY OR AGAINST INCOMPETENTS

Guardians ad litem to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are

under guardianship, or otherwise incapable of suing for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their prochein ami; subject, however, to such orders as the court or judge may direct for the protection of infants and other persons.

71

FORM OF DECREE

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:" (Here insert the decree or order.)

72

CORRECTION OF CLERICAL MISTAKES IN ORDERS AND DECREES

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before the close of the term at which final decree is rendered, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

73

PRELIMINARY INJUNCTIONS AND TEMPORARY RESTRAINING ORDERS

(See ante, p. 427.)

74

INJUNCTION PENDING APPEAL

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying or restoring the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.

75

RECORD ON APPEAL—REDUCTION AND PREPARATION

In case of appeal:

(a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together

with proof or acknowledgment of service of a copy on the appellee or his solicitor, a præcipe which shall indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his præcipe also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.

(b) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his præcipe under paragraph (a) of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

(c) If any difference arise between the parties concerning directions as to the general contents of the record to be prepared on the appeal, such difference shall be submitted to the court or judge in conformity with the provisions of paragraph (b) of this rule and shall be covered by the directions which the court or judge may give on the subject.

76

RECORD ON APPEAL—REDUCTION AND PREPARATION—COSTS—CORRECTION OF OMISSIONS

In preparing the transcript on an appeal, especial care shall be taken to avoid the inclusion of more than one copy of the same paper and to exclude the formal and immaterial parts of all exhibits, documents and other papers included therein; and for any infraction of this or any kindred rule the appellate court may withhold or impose costs as the circumstances of the case and the dis-

couragement of like infractions in the future may require. Costs for such an infraction may be imposed upon offending solicitors as well as parties.

If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript.

77

RECORD ON APPEAL—AGREED STATEMENT

When the questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and evidence, the parties, with the approval of the District Court or the judge thereof, may prepare and sign a statement of the case showing how the questions arose and were decided in the District Court and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by the appellate court. Such statement, when filed in the office of the clerk of the District Court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken, and, together with such decree, shall be copied and certified to the appellate court as the record on appeal.

78

AFFIRMATION IN LIEU OF OATH

Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

79

ADDITIONAL RULES BY DISTRICT COURT

With the concurrence of a majority of the Circuit Judges for the circuit, the District Courts may make any other and further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same.

80

COMPUTATION OF TIME—SUNDAYS AND HOLIDAYS

When the time prescribed by these rules for doing any act expires on a Sunday or legal holiday, such time shall extend to and include the next succeeding day that is not a Sunday or legal holiday.

81

THESE RULES EFFECTIVE FEBRUARY 1, 1913—OLD RULES ABROGATED

These rules shall be in force on and after February 1, 1913, and shall govern all proceedings in cases then pending or thereafter brought, save that where in any then pending cause an order has been made or act done which cannot be changed without doing substantial injustice, the court may give effect to such order or act to the extent necessary to avoid any such injustice.

All rules theretofore prescribed by the Supreme Court, regulating the practice in suits in equity, shall be abrogated when these rules take effect.

THE JUDICIAL CODE

ACT MARCH 3, 1911, c. 231. [S. 7031.]

An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary. (36 Stat. 1087.)

Be it enacted, &c., That the laws relating to the judiciary be, and they hereby are, codified, revised, and amended, with title, chapters, head-notes, and sections, entitled, numbered, and to read as follows:

TITLE

THE JUDICIARY

CHAPTER ONE

DISTRICT COURTS—ORGANIZATION

Sec.
1. District courts established; appointment and residence of judges.
2. Salaries of district judges.
3. Clerks.
4. Deputy clerks.
5. Criers and bailiffs.
6. Records; where kept.
7. Effect of altering terms.
8. Trials not discontinued by new term.
9. Court always open as courts of admiralty and equity.
10. Monthly adjournments for trial of criminal causes.
11. Special terms.
12. Adjournment in case of nonattendance of judge.
13. Designation of another judge in case of disability of judge.
14. Designation of another judge in case of an accumulation of business.
15. When designation to be made by Chief Justice.
16. New appointment and revocation.
17. Designation of district judge in aid of another judge.
18. When circuit judge may be designated to hold district court.
19. Duty of district and circuit judge in such cases.
20. When district judge is interested or related to parties.
21. When affidavit of personal bias or prejudice of judge is filed.
22. Continuance in case of vacancy in office.
23. Districts having more than one judge; division of business.

District courts established; appointment and residence of judges

Sec. 1. In each of the districts described in chapter five, there shall be a court called a district court, for which there shall be appointed one judge, to be called a district judge; except that in the northern district of California, the northern district of Illinois, the district of Maryland, the district of Minnesota, the district of Nebraska, the district of New Jersey, the eastern district of New

York, the northern and southern districts of Ohio, the district of Oregon, the eastern and western districts of Pennsylvania, and the western district of Washington, there shall be an additional district judge in each, and in the southern district of New York, three additional district judges: Provided, That whenever a vacancy shall occur in the office of the district judge for the district of Maryland, senior in commission, such vacancy shall not be filled, and thereafter there shall be but one district judge in said district: Provided further, That there shall be one judge for the eastern and western districts of South Carolina, one judge for the eastern and middle districts of Tennessee, and one judge for the northern and southern districts of Mississippi: Provided further, That the district judge for the middle district of Alabama shall continue as heretofore to be a district judge for the northern district thereof. Every district judge shall reside in the district or one of the districts for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor.

Salaries of district judges

Sec. 2. Each of the district judges shall receive a salary of six thousand dollars a year, to be paid in monthly installments.

Clerks

Sec. 3. A clerk shall be appointed for each district court by the judge thereof, except in cases otherwise provided for by law.

Deputy clerks

Sec. 4. Except as otherwise specially provided by law, the clerk of the district court for each district may, with the approval of the district judge thereof, appoint such number of deputy clerks as may be deemed necessary by such judge, who may be designated to reside and maintain offices at such places of holding court as the judge may determine. Such deputies may be removed at the pleasure of the clerk appointing them, with the concurrence of the district judge. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk, in his name, until a clerk is appointed and qualified; and for the default or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate and the sureties on his official bond shall be liable; and his executor or administrator shall have such remedy for any such default or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.

Criers and bailiffs

Sec. 5. The district court for each district may appoint a crier for the court; and the marshal may appoint such number of persons, not exceeding five, as the judge may determine, to wait upon the grand and other juries, and for other necessary purposes.

Records; where kept

Sec. 6. The records of a district court shall be kept at the place where the court is held. When it is held at more than one place in any district and the place of keeping the records is not specially provided by law, they shall be kept at either of the places of holding the court which may be designated by the district judge.

Effect of altering terms

Sec. 7. No action, suit, proceeding, or process in any district court shall abate or be rendered invalid by reason of any act changing the time of holding such court, but the same shall be deemed to be returnable to, pending, and triable in the terms established next after the return day thereof.

Trials not discontinued by new term

Sec. 8. When the trial or hearing of any cause, civil or criminal, in a district court has been commenced and is in progress before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of said court; but the court may proceed therein and bring it to a conclusion in the same manner and with the same effect as if another stated term of the court had not intervened.

Courts always open as courts of admiralty and equity

Sec. 9. The district courts, as courts of admiralty and as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

Monthly adjournments for trial of criminal causes

Sec. 10. District courts shall hold monthly adjournments of their regular terms, for the trial of criminal causes, when their business requires it to be done, in order to prevent undue expenses and delays in such cases.

Special terms

Sec. 11. A special term of any district court may be held at the same place where any regular term is held, or at such other place in the district as the nature of the business may require, and at such time and upon such notice as may be ordered by the district judge. Any business may be transacted at such special term which might be transacted at a regular term.

Adjournment in case of nonattendance of judge

Sec. 12. If the judge of any district court is unable to attend at the commencement of any regular, adjourned, or special term, or any time during such term, the court may be adjourned by the marshal, or clerk, by virtue of a written order directed to him by the judge, to the next regular term, or to any earlier day, as the order may direct.

Designation of another judge in case of disability of judge

Sec. 13. When any district judge is prevented, by any disability, from holding any stated or appointed term of his district court, and that fact is made to appear by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit in which the district lies, any such circuit judge or justice may, if in his judgment the public interests so require, designate and appoint the judge of any other district in the same circuit to hold said court, and to discharge all the judicial duties of the judge so disabled, during such disability. Whenever it shall be certified by any such circuit judge or, in his absence, by the circuit justice of the circuit in which the district lies, that for any sufficient reason it is impracticable to designate and appoint a judge of another district within the circuit to perform the duties of such disabled judge, the chief justice may, if in his judgment the public interests so require, designate and appoint the judge of any district in another circuit to hold said court and to discharge all the judicial duties of the judge so disabled, during such disability. Such appointment shall be filed in the clerk's office, and entered on the minutes of the said district court, and a certified copy thereof, under the seal of the court, shall be transmitted by the clerk to the judge so designated and appointed.

Designation of another judge in case of an accumulation of business

Sec. 14. When, from the accumulation or urgency of business in any district court, the public interests require the designation and appointment hereinafter provided, and the fact is made to appear, by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit in which the district lies, such circuit judge or justice may designate and appoint the judge of any other district in the same circuit to have and exercise within the district first named the same powers that are vested in the judge thereof. Each of the said district judges may, in case of such appointment, hold separately at the same time a district court in such district, and discharge all the judicial duties of the district judge therein.

When designation to be made by Chief Justice

Sec. 15. If all the circuit judges and the circuit justice are absent from the circuit, or are unable to execute the provisions of either of the two preceding sections, or if the district judge so designated is disabled or neglects to hold the court and transact the business for which he is designated, the clerk of the district court shall certify the fact to the Chief Justice of the United States, who may thereupon designate and appoint in the manner aforesaid the judge of any district within such circuit or within any other circuit; and said appointment shall be transmitted to the clerk and be acted upon by him as directed in the preceding section.

New appointment and revocation

Sec. 16. Any such circuit judge, or circuit justice, or the Chief Justice, as the case may be, may, from time to time, if in his judgment the public interests so require, make a new designation and appointment of any other district judge, in the manner, for the duties, and with the powers mentioned in the three preceding sections, and revoke any previous designation and appointment.

Designation of district judge in aid of another judge

Sec. 17. It shall be the duty of the senior circuit judge then present in the circuit, whenever in his judgment the public interest so requires, to designate and appoint, in the manner and with the powers provided in section fourteen, the district judge of any judicial district within his circuit to hold a district court in the place or in aid of any other district judge within the same circuit.

When circuit judge may be designated to hold district court

Sec. 18. Whenever, in the judgment of the senior circuit judge of the circuit in which the district lies, or of the circuit justice assigned to such circuit, or of the Chief Justice, the public interest shall require, the said judge, or associate justice, or Chief Justice, shall designate and appoint any circuit judge of the circuit to hold said district court.

Duty of district and circuit judge in such cases

Sec. 19. It shall be the duty of the district or circuit judge who is designated and appointed under either of the six preceding sections, to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district.

When district judge is interested or related to parties

Sec. 20. Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so

related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen.

When affidavit of personal bias or prejudice of judge is filed

Sec. 21. Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

Continuance in case of vacancy in office

Sec. 22. When the office of judge of any district court becomes vacant, all process, pleadings, and proceedings pending before such court shall, if necessary, be continued by the clerk thereof until such times as a judge shall be appointed, or designated to hold such court; and the judge so designated, while holding such court, shall possess the powers conferred by, and be subject to the provisions contained in, section nineteen.

Districts having more than one judge; division of business

Sec. 23. In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district.

CHAPTER TWO

DISTRICT COURTS—JURISDICTION

Sec.
24. Original jurisdiction.
Par. 1. Where the United States are plaintiffs; and of civil suits at common law or in equity.
2. Of crimes and offenses.
3. Of admiralty causes, seizures, and prizes.
4. Of suits under any law relating to the slave trade.
5. Of cases under internal revenue, customs, and tonnage laws.
6. Of suits under postal laws.
7. Of suits under the patent, the copyright, and the trade-mark laws.
8. Of suits for violation of interstate commerce laws.
9. Of penalties and forfeitures.
10. Of suits on debentures.
11. Of suits for injuries on account of acts done under laws of the United States.
12. Of suits concerning civil rights.
13. Of suits against persons having knowledge of conspiracy, etc.
Sec.
Par. 14. Of suits to redress the deprivation, under color of law, of civil rights.
15. Of suits to recover certain offices.
16. Of suits against national-banking associations.
17. Of suits by aliens for torts.
18. Of suits against consuls and vice consuls.
19. Of suits and proceedings in bankruptcy.
20. Of suits against the United States.
21. Of suits for the unlawful inclosure of public lands.
22. Of suits under immigration and contract-labor laws.
23. Of suits against trusts, monopolies, and unlawful combinations.
24. Of suits concerning allotments of land to Indians.
25. Of partition suits where United States is joint tenant.
25. Appellate jurisdiction under Chinese-exclusion laws.
26. Appellate jurisdiction over Yellowstone National Park.
27. Jurisdiction of crimes on Indian reservations in South Dakota.

Original jurisdiction

Sec. 24. The district courts shall have original jurisdiction as follows:

Where the United States are plaintiffs; and of civil suits at common law or in equity

First. [See ante, p. 219.]

Of crimes and offenses

Second. Of all crimes and offenses cognizable under the authority of the United States.

Of admiralty causes, seizures, and prizes

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

Of suits under any law relating to the slave trade

Fourth. Of all suits arising under any law relating to the slave trade.

Of cases under internal revenue, customs, and tonnage laws

Fifth. Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals.

Of suits under postal laws

Sixth. Of all cases arising under the postal laws.

Of suits under the patent, the copyright, and the trade-mark laws

Seventh. Of all suits at law or in equity arising under the patent, the copyright, and the trade-mark laws.

Of suits for violation of interstate commerce laws

Eighth. Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court.

Of penalties and forfeitures

Ninth. Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States.

Of suits on debentures

Tenth. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

Of suits for injuries on account of acts done under laws of the United States

Eleventh. Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several States.

Of suits concerning civil rights

Twelfth. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his

person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, Revised Statutes.

Of suits against persons having knowledge of conspiracy, etc.

Thirteenth. Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section nineteen hundred and eighty, Revised Statutes, are about to be done, and, having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act.

Of suits to redress the deprivation, under color of law, of civil rights

Fourteenth. Of all suits at law or in equity, authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

Of suits to recover certain offices

Fifteenth. Of all suits to recover possession of any office, except that of elector of President or Vice President, Representative in or Delegate to Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: Provided, That such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the States.

Of suits against national-banking associations

Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title "National Banks," Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located.

Of suits by aliens for torts

Seventeenth. Of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States.

Of suits against consuls and vice consuls

Eighteenth. Of all suits against consuls aand vice consuls.

Of suits and proceedings in bankruptcy

Nineteenth. Of all matters and proceedings in bankruptcy.

Of suits against the United States

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: Provided, however, That nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as "war claims," or to hear and determine other claims which had been rejected or reported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen hundred and ninety-eight, shall abate or be affected by this provision: And provided further, That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: Provided, That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought

and tried under the provisions of this paragraph shall be tried by the court without a jury.

Of suits for the unlawful inclosure of public lands

Twenty-first. Of proceedings in equity, by writ of injunction, to restrain violations of the provisions of laws of the United States to prevent the unlawful inclosure of public lands; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure.

Of suits under immigration and contract-labor laws

Twenty-second. Of all suits and proceedings arising under any law regulating the immigration of aliens, or under the contract labor laws.

Of suits against trusts, monopolies, and unlawful combinations

Twenty-third. Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

Of suits concerning allotments of land to Indians

Twenty-fourth. Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty. And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands now or hereafter held by either of the Five Civilized Tribes, the Osage Nation of Indians, nor to any of the lands within the Quapaw Indian Agency: Provided, That the right of Appeal shall be allowed to either party as in other cases. (As amended December 21, 1911, 37 Stat. 46.)

Of partition suits where United States is joint tenant

Twenty-fifth. Of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the district in which land is situate.

Appellate jurisdiction under Chinese-exclusion laws

Sec. 25. The district courts shall have appellate jurisdiction of the judgments and orders of United States commissioners in cases arising under the Chinese exclusion laws.

Appellate jurisdiction over Yellowstone National Park

Sec. 26. The district court for the district of Wyoming shall have jurisdiction of all felonies committed within the Yellowstone National Park and appellate jurisdiction of judgments in cases of con-

viction before the commissioner authorized to be appointed under section five of an Act entitled "An Act to protect the birds and animals in Yellowstone National Park, and to punish crimes in said Park, and for other purposes," approved May seventh, eighteen hundred and ninety-four.

Jurisdiction of crimes on Indian reservations in South Dakota

Sec. 27. The district court of the United States for the district of South Dakota shall have jurisdiction to hear, try, and determine all actions and proceedings in which any person shall be charged with the crime of murder, manslaughter, rape, assault with intent to kill, arson, burglary, larceny, or assault with a dangerous weapon, committed within the limits of any Indian reservation in the State of South Dakota.

CHAPTER THREE

DISTRICT COURTS—REMOVAL OF CAUSES

Sec.
28. Removal of suits from State to United States district courts.
29. Procedure for removal.
30. Suits under grants of land from different States.
31. Removal of causes against persons denied any civil rights, etc.
32. When petitioner is in actual custody of State court.
33. Suits and prosecutions against revenue officers, etc.
34. Removal of suits by aliens.
35. When copies of records are refused by clerk of State court.
36. Previous attachment bonds, orders, etc., remain valid.
37. Suits improperly in district court may be dismissed or remanded.
38. Proceedings in suits removed.
39. Time for filing record; return of record, how enforced.

Removal of suits from State to United States district courts

Sec. 28. [See ante, p. 309.]

Procedure for removal

Sec. 29. [See ante, p. 351.]

Suits under grants of land from different States

Sec. 30. [See ante, p. 325.]

Removal of causes against persons denied any civil rights, etc.

Sec. 31. When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or can not enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the

jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next district court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. It shall be the duty of the clerk of the State court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the district court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the district court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and, in case of his default, may order a nonsuit, and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the district court, as herein provided, a certificate, under the seal of the district court, stating such failure, shall be given, and upon the production thereof in said State court the cause shall proceed therein as if no petition for removal had been filed.

When petitioner is in actual custody of State court

Sec. 32. When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said State court, it shall be the duty of the clerk of said district court to issue a writ of habeas corpus cum causa, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said district court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said State court a duplicate copy of said writ.

Suits and prosecutions against revenue officers, etc.

Sec. 33. When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; or when any suit is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty, in executing any order of such House, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the district court next to be holden in the district where the same is pending, upon the petition of such defendant to said district court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit, and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the district court, and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons. subpœna, petition, or other process except capias, the clerk of the district court shall issue a writ of certiorari to the State court, requiring it to send to the district court the record and proceedings in the cause. When it is commenced by capias or by any other similar form or proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus cum causa, a duplicate of which shall be delivered to the clerk of the State court, or left at his office, by the marshal of the district or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the district court, and any further proceedings, trial, or judgment therein in the State court shall be void. If the defendant in the suit or prosecution be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of habeas corpus cum causa,

to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the district court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the district court that no copy of the record and proceedings therein in the State court can be obtained, the district court may allow and require the plaintiff to proceed de novo and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said district court. On failure of the plaintiff so to proceed, judgment of non prosequitur may be rendered against him, with costs for the defendant.

Removal of suits by aliens

Sec. 34. Whenever a personal action has been or shall be brought in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States, being a non-resident of that State wherein jurisdiction is obtained by the State court, by personal service of process, such action may be removed into the district court of the United States in and for the district in which the defendant shall have been served with the process, in the same manner as now provided for the removal of an action brought in a State court by the provisions of the preceding section.

When copies of records are refused by clerk of State court

Sec. 35. In any case where a party is entitled to copies of the records and proceedings in any suit or prosecution in a State court, to be used in any court of the United States, if the clerk of said State court, upon demand, and the payment or tender of the legal fees, refuses or neglects to deliver to him certified copies of such records and proceedings, the court of the United States in which such records and proceedings are needed may, on proof by affidavit that the clerk of said State court has refused or neglected to deliver copies thereof, on demand as aforesaid, direct such record to be supplied by affidavit or otherwise, as the circumstances of the case may require and allow; and thereupon such proceeding, trial, and judgment may be had in the said court of the United States, and all such processes awarded, as if certified copies of such records and proceedings had been regularly before the said court.

Previous attachment bonds, orders, etc., remain valid

Sec. 36. When any suit shall be removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. All bonds, undertakings, or security given by either party in such suit

prior to its removal shall remain valid and effectual notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

Suits improperly in district court may be dismissed or remanded

Sec. 37. [See ante, p. 285.]

Proceedings in suits removed

Sec. 38. The district court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said State court prior to its removal.

Time for filing record; return of record, how enforced

Sec. 39. In all causes removable under this chapter, if the clerk of the State court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall, on conviction thereof in the district court of the United States to which said action or proceeding was removed, be fined not more than one thousand dollars, or imprisoned not more than one year, or both. The district court to which any cause shall be removable under this chapter shall have power to issue a writ of certiorari to said State court commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this chapter for the removal of the same, and enforce said writ according to law. If it shall be impossible for the parties or persons removing any cause under this chapter, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the district court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty, as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said district court shall require the other party to plead, and said action or proceeding shall proceed to final judgment. The said district court may make an order requiring the parties thereto to plead de novo; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.

CHAPTER FOUR

DISTRICT COURTS—MISCELLANEOUS PROVISIONS

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40. Capital cases; where triable.
41. Offenses on the high seas, etc., where triable.
42. Offenses begun in one district and completed in another.
43. Suits for penalties and forfeitures, where brought.
44. Suits for internal-revenue taxes, where brought.
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46. Capture of insurrectionary property, where cognizable.
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51. Civil suits; where to be brought.
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61. Commissioners to administer oaths to appraisers.
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65. Receivers to manage property according to State laws.
66. Suits against receiver.
67. Certain persons not to be appointed or employed as officers of courts.
68. Certain persons not to be masters or receivers.

Capital cases; where triable

Sec. 40. The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience.

Offenses on the high seas, etc., where triable

Sec. 41. The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.

Offenses begun in one district and completed in another

Sec. 42. When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.

Suits for penalties and forfeitures, where brought

Sec. 43. All pecuniary penalties and forfeitures may be sued for and recovered either in the district where they accrue or in the district where the offender is found.

Suits for internal-revenue taxes, where brought

Sec. 44. Taxes accruing under any law providing internal revenue may be sued for and recovered either in the district where the liability for such tax occurs or in the district where the delinquent resides.

Seizures, where cognizable

Sec. 45. Proceedings on seizures made on the high seas, for forfeiture under any law of the United States, may be prosecuted in any district into which the property so seized is brought and proceedings instituted. Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made, except in cases where it is otherwise provided.

Capture of insurrectionary property, where cognizable

Sec. 46. Proceedings for the condemnation of any property captured, whether on the high seas or elsewhere out of the limits of any judicial district, or within any district, on account of its being purchased or acquired, sold or given, with intent to use or employ the same, or to suffer it to be used or employed, in aiding, abetting, or promoting any insurrection against the Government of the United States, or knowingly so used or employed by the owner thereof, or with his consent, may be prosecuted in any district where the same may be seized, or into which it may be taken and proceedings first instituted.

Certain seizures cognizable in any district into which the property is taken

Sec. 47. Proceedings on seizures for forfeiture of any vessel or cargo entering any port of entry which has been closed by the President in pursuance of law, or of goods and chattels coming from a State or section declared by proclamation of the President to be in insurrection into other parts of the United States, or of any vessel or vehicle conveying such property, or conveying persons to or from such State or section, or of any vessel belonging, in whole or in part, to any inhabitant of such State or section, may be prosecuted in any district into which the property so seized may be taken and proceedings instituted; and the district court thereof shall have as full jurisdiction over such proceedings as if the seizure was made in that district.

Jurisdiction in patent cases

Sec. 48. In suits brought for the infringement of letters patent the district courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant,

or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpœna upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought.

Proceedings to enjoin Comptroller of the Currency

Sec. 49. All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located.

When a part of several defendants can not be served

Sec. 50. [See ante, p. 256.]

Civil suits; where to be brought

Sec. 51. [See ante, p. 264.]

Suits in States containing more than one district

Sec. 52. [See ante, p. 271.]

Districts containing more than one division; where suit to be brought; transfer of criminal cases

Sec. 53. When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides; but if there are two or more defendants residing in different divisions of the district it may be brought in either division. All mesne and final process subject to the provisions of this section may be served and executed in any or all of the divisions of the district, or if the State contains more than one district, then in any of such districts, as provided in the preceding section. All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district. When a transfer is ordered by the court or judge, all the papers in the case, or certified copies thereof, shall be transmitted by the clerk, under the seal of the court, to the division to which the cause is so ordered transferred; and thereupon the cause shall be proceeded with in said division in the same manner as if the offense had been committed therein. In all cases of the removal of suits from the courts of a State to the district court of the United States such removal shall be to the United States district court in the division in which the county is situated from which the removal is made; and the time within which the removal shall be perfected, in so far as it refers to or is regulated by the terms

of United States courts, shall be deemed to refer to the terms of the United States district court in such division.

Suits of a local nature, where to be brought

Sec. 54. [See ante, p. 272.]

When property lies in different districts in same State

Sec. 55. [See ante, p. 272.]

When property lies in different States in same circuit; jurisdiction of receiver

Sec. 56. Where in any suit in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within different States in the same judicial circuit, the receiver so appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit; subject, however, to the disapproval of such order, within thirty days thereafter, by the circuit court of appeals for such circuit, or by a circuit judge thereof, after reasonable notice to adverse parties and an opportunity to be heard upon the motion for such disapproval; and subject, also, to the filing and entering in the district court for each district of the circuit in which any portion of the property may lie or be, within ten days thereafter, of a duly certified copy of the bill and of the order of appointment. The disapproval of such appointment within such thirty days, or the failure to file such certified copy of the bill and order of appointment within ten days, as herein required, shall divest such receiver of jurisdiction over all such property except that portion thereof lying or being within the State in which the suit is brought. In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district; but orders affecting such property shall be entered of record in each district in which the property affected may lie or be.

Absent defendants in suits to enforce liens, remove clouds on titles, etc.

Sec. 57. [See ante, p. 273.]

Civil causes may be transferred to another division of district by agreement

Sec. 58. Any civil cause, at law or in equity, may, on written stipulation of the parties or of their attorneys of record signed and filed with the papers in the case, in vacation or in term, and on the written order of the judge signed and filed in the case in vacation or on the order of the court duly entered of record in term, be transferred to the court of any other division of the same district, without regard to the residence of the defendants, for trial. When a cause

shall be ordered to be transferred to a court in any other division, it shall be the duty of the clerk of the court from which the transfer is made to carefully transmit to the clerk of the court to which the transfer is made the entire file of papers in the cause and all documents and deposits in his court pertaining thereto, together with a certified transcript of the records of all orders, interlocutory decrees, or other entries in the cause; and he shall certify, under the seal of the court, that the papers sent are all which are on file in said court belonging to the cause; for the performance of which duties said clerk so transmitting and certifying shall receive the same fees as are now allowed by law for similar services, to be taxed in the bill of costs, and regularly collected with the other costs in the cause; and such transcript, when so certified and received, shall henceforth constitute a part of the record of the cause in the court to which the transfer shall be made. The clerk receiving such transcript and original papers shall file the same and the case shall then proceed to final disposition as other cases of a like nature.

Upon creation of new district or division, where prosecution to be instituted or action brought

Sec. 59. Whenever any new district or division has been or shall be established, or any county or territory has been or shall be transferred from one district or division to another district or division, prosecutions for crimes and offenses committed within such district, division, county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the cause to be removed to the new district or division for trial. Civil actions pending at the time of the creation of any such district or division, or the transfer of any such county or territory, and arising within the district or division so created or the county or territory so transferred, shall be tried in the district or division as it existed at the time of the institution of the action, or in the district or division so created, or to which the county or territory is or shall be so transferred, as may be agreed upon by the parties, or as the court shall direct. The transfer of such prosecutions and actions shall be made in the manner provided in the section last preceding.

Creation of new district, or transfer of territory not to divest lien; how lien to be enforced

Sec. 60. The creation of a new district or division, or the transfer of any county or territory from one district or division to another district or division, shall not affect or divest any lien theretofore acquired in the circuit or district court by virtue of a decree, judgment, execution, attachment, seizure, or otherwise, upon property situated or being within the district or division so created, or the county or territory so transferred. To enforce any such lien, the clerk of the court in which the same is acquired, upon the request

of United States courts, shall be deemed to refer to the terms of the United States district court in such division.

Suits of a local nature, where to be brought

Sec. 54. [See ante, p. 272.]

When property lies in different districts in same State

Sec. 55. [See ante, p. 272.]

When property lies in different States in same circuit; jurisdiction of receiver

Sec. 56. Where in any suit in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within different States in the same judicial circuit, the receiver so appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit; subject, however, to the disapproval of such order, within thirty days thereafter, by the circuit court of appeals for such circuit, or by a circuit judge thereof, after reasonable notice to adverse parties and an opportunity to be heard upon the motion for such disapproval; and subject, also, to the filing and entering in the district court for each district of the circuit in which any portion of the property may lie or be, within ten days thereafter, of a duly certified copy of the bill and of the order of appointment. The disapproval of such appointment within such thirty days, or the failure to file such certified copy of the bill and order of appointment within ten days, as herein required, shall divest such receiver of jurisdiction over all such property except that portion thereof lying or being within the State in which the suit is brought. In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district; but orders affecting such property shall be entered of record in each district in which the property affected may lie or be.

Absent defendants in suits to enforce liens, remove clouds on titles, etc.

Sec. 57. [See ante, p. 273.]

Civil causes may be transferred to another division of district by agreement

Sec. 58. Any civil cause, at law or in equity, may, on written stipulation of the parties or of their attorneys of record signed and filed with the papers in the case, in vacation or in term, and on the written order of the judge signed and filed in the case in vacation or on the order of the court duly entered of record in term, be transferred to the court of any other division of the same district, without regard to the residence of the defendants, for trial. When a cause

shall be ordered to be transferred to a court in any other division, it shall be the duty of the clerk of the court from which the transfer is made to carefully transmit to the clerk of the court to which the transfer is made the entire file of papers in the cause and all documents and deposits in his court pertaining thereto, together with a certified transcript of the records of all orders, interlocutory decrees, or other entries in the cause; and he shall certify, under the seal of the court, that the papers sent are all which are on file in said court belonging to the cause; for the performance of which duties said clerk so transmitting and certifying shall receive the same fees as are now allowed by law for similar services, to be taxed in the bill of costs, and regularly collected with the other costs in the cause; and such transcript, when so certified and received, shall henceforth constitute a part of the record of the cause in the court to which the transfer shall be made. The clerk receiving such transcript and original papers shall file the same and the case shall then proceed to final disposition as other cases of a like nature.

Upon creation of new district or division, where prosecution to be instituted or action brought

Sec. 59. Whenever any new district or division has been or shall be established, or any county or territory has been or shall be transferred from one district or division to another district or division, prosecutions for crimes and offenses committed within such district, division, county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the cause to be removed to the new district or division for trial. Civil actions pending at the time of the creation of any such district or division, or the transfer of any such county or territory, and arising within the district or division so created or the county or territory so transferred, shall be tried in the district or division as it existed at the time of the institution of the action, or in the district or division so created, or to which the county or territory is or shall be so transferred, as may be agreed upon by the parties, or as the court shall direct. The transfer of such prosecutions and actions shall be made in the manner provided in the section last preceding.

Creation of new district, or transfer of territory not to divest lien; how lien to be enforced

Sec. 60. The creation of a new district or division, or the transfer of any county or territory from one district or division to another district or division, shall not affect or divest any lien theretofore acquired in the circuit or district court by virtue of a decree, judgment, execution, attachment, seizure, or otherwise, upon property situated or being within the district or division so created, or the county or territory so transferred. To enforce any such lien, the clerk of the court in which the same is acquired, upon the request

and at the cost of the party desiring the same, shall make a true and certified copy of the record thereof, which, when so made and certified, and filed in the proper court of the district or division in which such property is situated or shall be, after such transfer, shall constitute the record of such lien in such court, and shall be evidence in all courts and places equally with the original thereof; and thereafter like proceedings shall be had thereon, and with the same effect, as though the cause or proceeding had been originally instituted in such court. The provisions of this section shall apply not only in all cases where a district or division is created, or a county or any territory is transferred by this or any future Act, but also in all cases where a district or division has been created, or a county or any territory has been transferred by any law heretofore enacted.

Commissioners to administer oaths to appraisers

Sec. 61. Any district judge may appoint commissioners, before whom appraisers of vessels or goods and merchandise seized for breaches of any law of the United States, may be sworn; and such oaths, so taken, shall be as effectual as if taken before the judge in open court.

Transfer of records to district court when a Territory becomes a State

Sec. 62. When any Territory is admitted as a State, and a district court is established therein, all the records of the proceedings in the several cases pending in the highest court of said Territory at the time of such admission, and all records of the proceedings in the several cases in which judgments or decrees had been rendered in said territorial court before that time, and from which writs of error could have been sued out or appeals could have been taken, or from which writs of error had been sued out or appeals had been taken and prosecuted to the Supreme Court or to the circuit court of appeals, shall be transferred to and deposited in the district court for the said State.

District judge shall demand and compel delivery of records of territorial court

Sec. 63. It shall be the duty of the district judge, in the case provided in the preceding section, to demand of the clerk, or other person having possession or custody of the records therein mentioned, the delivery thereof, to be deposited in said district court; and in case of the refusal of such clerk or person to comply with such demand, the said district judge shall compel the delivery of such records by attachment or otherwise, according to law.

Jurisdiction of district courts in cases transferred from territorial courts

Sec. 64. When any Territory is admitted as a State, and a district court is established therein, the said district court shall take cogni-

zance of all cases which were pending and undetermined in the trial courts of such Territory, from the judgments or decrees to be rendered in which writs of error could have been sued out or appeals taken to the Supreme Court or to the circuit court of appeals, and shall proceed to hear and determine the same.

Receivers to manage property according to State laws

Sec. 65. Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both.

Suits against receiver

Sec. 66. Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice.

Certain persons not to be appointed or employed as officers of courts

Sec. 67. No person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to the judge of such court: Provided, That no such person at present holding a position or employment in a circuit court shall be debarred from similar appointment or employment in the district court succeeding to such circuit court jurisdiction. (As amended December 21, 1911, 37 Stat. 46.)

Certain persons not to be masters or receivers

Sec. 68. No clerk of a district court of the United States or his deputy shall be appointed a receiver or master in any case, except where the judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment.

CHAPTER FIVE

DISTRICT COURTS—DISTRICTS, AND PROVISIONS APPLICABLE TO PARTICULAR STATES

[Omitted as of no general interest.]

CHAPTER SIX

CIRCUIT COURTS OF APPEALS

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Circuits

Sec. 116. There shall be nine judicial circuits of the United States, constituted as follows:

First. The first circuit shall include the districts of Rhode Island, Massachusetts, New Hampshire, and Maine.

Second. The second circuit shall include the districts of Vermont, Connecticut, and New York.

Third. The third circuit shall include the districts of Pennsylvania, New Jersey, and Delaware.

Fourth. The fourth circuit shall include the districts of Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

Fifth. The fifth circuit shall include the districts of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.

Sixth. The sixth circuit shall include the districts of Ohio, Michigan, Kentucky, and Tennessee.

Seventh. The seventh circuit shall include the districts of Indiana, Illinois, and Wisconsin.

Eighth. The eighth circuit shall include the districts of Nebraska, Minnesota, Iowa, Missouri, Kansas, Arkansas, Colorado, Wyoming, North Dakota, South Dakota, Utah, and Oklahoma.

Ninth. The ninth circuit shall include the districts of California, Oregon, Nevada, Washington, Idaho, Montana, and Hawaii.

Circuit courts of appeals

Sec. 117. There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a

quorum, and which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established.

Circuit judges

Sec. 118. There shall be in the second, seventh, and eighth circuits, respectively, four circuit judges; in the fourth circuit, two circuit judges; and in each of the other four circuits, three circuit judges to be appointed by the President, by and with the advice and consent of the Senate. They shall be entitled to receive a salary at the rate of seven thousand dollars a year each, payable monthly. Each circuit judge shall reside within his circuit. The circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit, and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law: Provided, That nothing in this section shall be construed to prevent any circuit judge holding district court or serving in the Commerce Court, or otherwise, as provided for and authorized in other sections of this act. (As amended January 13, 1912, 37 Stat. 52.)

Allotment of justices to the circuits

Sec. 119. The Chief Justice and associate justices of the Supreme Court shall be allotted among the circuits by an order of the court, and a new allotment shall be made whenever it becomes necessary or convenient by reason of the alteration of any circuit, or of the new appointment of a Chief Justice or associate justice, or otherwise. If a new allotment becomes necessary at any other time than during a term, it shall be made by the Chief Justice, and shall be binding until the next term and until a new allotment by the court. Whenever, by reason of death or resignation, no justice is allotted to a circuit, the Chief Justice may, until a justice is regularly allotted thereto, temporarily assign a justice of another circuit to such circuit.

Chief Justice and associate justices of Supreme Court, and district judges, may sit in circuit court of appeals

Sec. 120. The Chief Justice and the associate justices of the Supreme Court assigned to each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits. In case the Chief Justice or an associate justice of the Supreme Court shall attend at any session of the circuit court of appeals, he shall preside. In the absence of such Chief Justice, or associate justice, the circuit judges in attendance upon the court shall preside in the order of the seniority of their respective commissions. In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or

particular assignment shall be designated by the court: Provided, That no judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals.

Justices allotted to circuits, how designated

Sec. 121. The words "circuit justice" and "justice of a circuit," when used in this title, shall be understood to designate the justice of the Supreme Court who is allotted to any circuit; but the word "judge," when applied generally to any circuit, shall be understood to include such justice.

Seals, forms of process, and rules

Sec. 122. Each of said circuit courts of appeals shall prescribe the form and style of its seal, and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction; and shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.

Marshals

Sec. 123. The United States marshals in and for the several districts of said courts shall be the marshals of said circuit courts of appeals, and shall exercise the same powers and perform the same duties, under the regulations of the court, as are exercised and performed by the marshal of the Supreme Court of the United States, so far as the same may be applicable.

Clerks

Sec. 124. Each court shall appoint a clerk, who shall exercise the same powers and perform the same duties in regard to all matters within its jurisdiction, as are exercised and performed by the clerk of the Supreme Court, so far as the same may be applicable.

Deputy clerks; appointment and removal

Sec. 125. The clerk of the circuit court of appeals for each circuit may, with the approval of the court, appoint such number of deputy clerks as the court may deem necessary. Such deputies may be removed at the pleasure of the clerk appointing them, with the approval of the court. In case of the death of the clerk his deputy or deputies shall, unless removed by the court, continue in office and perform the duties of the clerk in his name until a clerk is appointed and has qualified; and for the defaults or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate and the sureties on his official bond shall be liable, and his executor or administrator shall have such remedy for such defaults or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.

Terms

Sec. 126. A term shall be held annually by the circuit courts of appeals in the several judicial circuits at the following places, and at such times as may be fixed by said courts, respectively: In the first circuit, in Boston; in the second circuit, in New York; in the third circuit, in Philadelphia; in the fourth circuit, in Richmond; in the fifth circuit, in New Orleans, Atlanta, Fort Worth, and Montgomery; in the sixth circuit, in Cincinnati; in the seventh circuit, in Chicago; in the eighth circuit, in Saint Louis, Denver or Cheyenne, and Saint Paul; in the ninth circuit, in San Francisco, and each year in two other places in said circuit to be designated by the judges of said court; and in each of the above circuits, terms may be held at such other times and in such other places as said courts, respectively, may from time to time designate: Provided, That terms shall be held in Atlanta on the first Monday in October, in Fort Worth on the first Monday in November, in Montgomery on the third Monday in October, in Denver or in Cheyenne on the first Monday in September, and in Saint Paul on the first Monday in May. All appeals, writs of error, and other appellate proceedings which may be taken or prosecuted from the district courts of the United States in the State of Georgia, in the State of Texas, and in the State of Alabama, to the circuit court of appeals for the fifth judicial circuit shall be heard and disposed of, respectively, by said court at the terms held in Atlanta, in Fort Worth, and in Montgomery, except that appeals or writs of error in cases of injunctions and in all other cases which, under the statutes and rules, or in the opinion of the court, are entitled to be brought to a speedy hearing may be heard and disposed of wherever said court may be sitting. All appeals, writs of errors, and other appellate proceedings which may hereafter be taken or prosecuted from the district court of the United States at Beaumont, Texas, to the circuit court of appeals for the fifth circuit, shall be heard and disposed of by the said circuit court of appeals at the terms of court held at New Orleans: Provided, That nothing herein shall prevent the court from hearing appeals or writs of error wherever the said courts shall sit, in cases of injunctions and in all other cases which, under the statutes and the rules, or in the opinion of the court, are entitled to be brought to a speedy hearing. All appeals, writs of error, and other appellate proceedings which may be taken or prosecuted from the district courts of the United States in the States of Colorado, Utah, and Wyoming, and the supreme court of the Territory of New Mexico to the circuit court of appeals for the eighth judicial circuit, shall be heard and disposed of by said court at the terms held either in Denver or in Cheyenne, except that any case arising in any of said States or Territory may, by consent of all the parties, be heard and disposed of at a term of said court other than the one held in Denver or Cheyenne.

Rooms for court, how provided

Sec. 127. The marshals for the several districts in which said circuit courts of appeals may be held shall, under the direction of the Attorney General, and with his approval, provide such rooms in the public buildings of the United States as may be necessary for the business of said courts, and pay all incidental expenses of said court, including criers, bailiffs, and messengers: Provided, That in case proper rooms can not be provided in such buildings, then the marshals, with the approval of the Attorney General, may, from time to time, lease such rooms as may be necessary for such courts.

Jurisdiction; when judgment final

Sec. 128. [See ante, p. 471.]

Appeals in proceedings for injunctions and receivers

Sec. 129. [See ante, p. 575.]

Appellate and supervisory jurisdiction under the bankrupt act

Sec. 130. The circuit courts of appeals shall have the appellate and supervisory jurisdiction conferred upon them by the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July first, eighteen hundred and ninety-eight, and all laws amendatory thereof, and shall exercise the same in the manner therein prescribed.

Appeals from the United States court for China

Sec. 131. The circuit court of appeals for the ninth circuit is empowered to hear and determine writs of error and appeals from the United States court for China, as provided in the Act entitled "An Act creating a United States court for China and prescribing the jurisdiction thereof," approved June thirtieth, nineteen hundred and six.

Allowance of appeals, etc.

Sec. 132. Any judge of a circuit court of appeals, in respect of cases brought or to be brought before that court, shall have the same powers and duties as to allowances of appeals and writs of error, and the conditions of such allowances, as by law belong to the justices or judges in respect of other courts of the United States, respectively.

Writs of error and appeals from the supreme courts of Arizona and New Mexico

Sec. 133. The circuit courts of appeals, in cases in which their judgments and decrees are made final by this title, shall have appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of Arizona and New Mexico, as by this title they may have to review the judgments, orders, and decrees of the district courts; and for that purpose said

Territories shall, by orders of the Supreme Court of the United States, to be made from time to time, be assigned to particular circuits.

Writs of error and appeals from district court for Alaska to circuit court of appeals for ninth circuit; court may certify questions to the Supreme Court

Sec. 134. In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in section two hundred and forty-seven, in which the amount involved or the value of the subject-matter in controversy shall exceed five hundred dollars, and in all criminal cases, writs of error and appeals shall lie from the district court for Alaska or from any division thereof, to the circuit court of appeals for the ninth circuit, and the judgments, orders, and decrees of said court shall be final in all such cases. But whenever such circuit court of appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any such case, the court may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the question or proposition certified to it, and its instructions shall be binding upon the circuit court of appeals.

Appeals and writs of error from Alaska; where heard

Sec. 135. All appeals, and writs of error, and other cases, coming from the district court for the district of Alaska to the circuit court of appeals for the ninth circuit, shall be entered upon the docket and heard at San Francisco, California, or at Portland, Oregon, or at Seattle, Washington, as the trial court before whom the case was tried below shall fix and determine: Provided, That at any time before the hearing of any appeal, writ of error, or other case, the parties thereto, through their respective attorneys, may stipulate at which of the above-named places the same shall be heard, in which case the case shall be remitted to and entered upon the docket at the place so stipulated and shall be heard there.

CHAPTER SEVEN

THE COURT OF CLAIMS

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Appointment, oath, and salary of judges

Sec. 136. The Court of Claims, established by the Act of February twenty-fourth, eighteen hundred and fifty-five, shall be continued. It shall consist of a chief justice and four judges, who shall be appointed by the President, by and with the advice and consent of the Senate, and hold their offices during good behavior. Each of them shall take an oath to support the Constitution of the United States, and to discharge faithfully the duties of his office. The chief justice shall be entitled to receive an annual salary of six thousand five hundred dollars, and each of the other judges an annual salary of six thousand dollars, payable monthly, from the Treasury.

Seal

Sec. 137. The Court of Claims shall have a seal, with such device as it may order.

Session; quorum

Sec. 138. The Court of Claims shall hold one annual session at the city of Washington, beginning on the first Monday in December

and continuing as long as may be necessary for the prompt disposition of the business of the court. Any three of the judges of said court shall constitute a quorum, and may hold a court for the transaction of business: Provided, That the concurrence of three judges shall be necessary to the decision of any case.

Officers of the court

Sec. 139. The said court shall appoint a chief clerk, an assistant clerk, if deemed necessary, a bailiff, and a chief messenger. The clerks shall take an oath for the faithful discharge of their duties, and shall be under the direction of the court in the performance thereof; and for misconduct or incapacity they may be removed by it from office; but the court shall report such removals, with the cause thereof, to Congress, if in session, or if not, at the next session. The bailiff shall hold his office for a term of four years, unless sooner removed by the court for cause.

Salaries of officers

Sec. 140. The salary of the chief clerk shall be three thousand five hundred dollars a year; of the assistant clerk two thousand five hundred dollars a year; of the bailiff one thousand five hundred dollars a year, and of the chief messenger one thousand dollars a year, payable monthly from the Treasury.

Clerk's bond

Sec. 141. The chief clerk shall give bond to the United States in such amount, in such form, and with such security as shall be approved by the Secretary of the Treasury.

Contingent fund

Sec. 142. The said clerk shall have authority when he has given bond as provided in the preceding section, to disburse, under the direction of the court, the contingent fund which may from time to time be appropriated for its use; and his accounts shall be settled by the proper accounting officers of the Treasury in the same way as the accounts of other disbursing agents of the Government are settled.

Reports to Congress; copies for departments, etc.

Sec. 143. On the first day of every regular session of Congress, the clerk of the Court of Claims shall transmit to Congress a full and complete statement of all the judgments rendered by the court during the previous year, stating the amounts thereof and the parties in whose favor they were rendered, together with a brief synopsis of the nature of the claims upon which they were rendered. At the end of every term of the court he shall transmit a copy of its decisions to the heads of departments; to the Solicitor, the Comptroller, and the Auditors of the Treasury; to the Commissioner of the General Land Office and of Indian Affairs; to the chiefs of bureaus,

and to other officers charged with the adjustment of claims against the United States.

Members of Congress not to practice in the court

Sec. 144. Whoever, being elected or appointed a Senator, Member of, or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment, and either before or after he has qualified, and during his continuance in office, practice in the Court of Claims, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall, moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States.

Jurisdiction

Sec. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:

Claims against the United States

First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: Provided, however, That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same.

Set-offs

Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: Provided, That no suit against the Government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under this chapter until an account for said fees shall have been rendered and finally acted upon as required by law, unless the proper accounting officer of the Treasury fails to act finally thereon within six months after the account is received in said office.

Disbursing officers

Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or

of his administrators or executors, for relief from responsibility on account of loss by capture or otherwise, while in the line of his duty, of Government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible.

Judgments for set-off or counterclaims; how enforced

Sec. 146. Upon the trial of any cause in which any set-off, counterclaim, claim for damages, or other demand is set up on the part of the Government against any person making claim against the Government in said court, the court shall hear and determine such claim or demand both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided for by law. Any transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records thereof, and shall thereby become and be a judgment of such court and be enforced as other judgments in such court are enforced.

Decree on accounts of disbursing officers

Sec. 147. Whenever the Court of Claims ascertains the facts of any loss by any paymaster, quartermaster, commissary of subsistence, or other disbursing officer, in the cases hereinbefore provided, to have been without fault or negligence on the part of such officer, it shall make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the Treasury shall allow to such officer the amount so decreed as a credit in the settlement of his accounts.

Claims referred by departments

Sec. 148. When any claim or matter is pending in any of the executive departments which involves controverted questions of fact or law, the head of such department may transmit the same, with the vouchers, papers, documents and proofs pertaining thereto, to the Court of Claims and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted for its guidance and action: Provided, however, That if it shall have been transmitted with the consent of the claimant, or if it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, in the latter case giving to either party such further opportunity for hearing as in its judgment justice shall require, and shall report its findings therein to the department by which the same was referred to said court. The Secretary of the Treasury may, upon the certificate of any auditor, or of the Comptroller of the Treasury, direct any claim or matter, of

which, by reason of the subject matter or character, the said court might under existing laws, take jurisdiction on the voluntary action of the claimant, to be transmitted, with all the vouchers, papers, documents and proofs pertaining thereto, to the said court for trial and adjudication.

Procedure in cases transmitted by departments

Sec. 149. All cases transmitted by the head of any department, or upon the certificate of any auditor, or of the Comptroller of the Treasury, according to the provisions of the preceding section, shall be proceeded in as other cases pending in the Court of Claims, and shall, in all respects, be subject to the same rules and regulations.

Judgments in cases transmitted by departments; how paid

Sec. 150. The amount of any final judgment or decree rendered in favor of the claimant, in any case transmitted to the Court of Claims under the two preceding sections, shall be paid out of any specific appropriation applicable to the case, if any such there be; and where no such appropriation exists, the judgment or decree shall be paid in the same manner as other judgments of the said court.

Either House of Congress may refer certain claims to court

Sec. 151. Whenever any bill, except for a pension, is pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the House in which such bill is pending may, for the investigation and determination of facts, refer the same to the Court of Claims, which shall proceed with the same in accordance with such rules as it may adopt and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy, together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity against the United States, and the amount, if any, legally or equitably due from the United States to the claimant: Provided, however, That if it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter, the subject matter of the bill is such that it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and it shall report its proceedings therein to the House of Congress by which the same was referred to said court.

Costs may be allowed prevailing party

Sec. 152. If the Government of the United States shall put in issue the right of the plaintiff to recover, the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court.

Claims growing out of treaties not cognizable therein

Sec. 153. The jurisdiction of the said court shall not extend to any claim against the Government not pending therein on December first, eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes.

Claims pending in other courts

Sec. 154. No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

Aliens

Sec. 155. Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction.

All claims to be filed within six years; exceptions

Sec. 156. Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues: Provided, That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

Rules of practice; may punish contempts

Sec. 157. The said court shall have power to establish rules for its government and for the regulation of practice therein, and it may

punish for contempt in the manner prescribed by the common law, may appoint commissioners, and may exercise such powers as are necessary to carry into effect the powers granted to it by law.

Oaths and acknowledgments

Sec. 158. The judges and clerks of said court may administer oaths and affirmations, take acknowledgments of instruments in writing, and give certificates of the same.

Petitions and verification

Sec. 159. The claimant shall in all cases fully set forth in his petition the claim, the action thereon in Congress or by any of the departments, if such action has been had, what persons are owners thereof or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of said claim or of any part thereof or interest therein has been made, except as stated in the petition; that said claimant is justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets; that the claimant and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to the Government of the United States, and, whether a citizen or not, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and that he believes the facts as stated in the said petition to be true. The said petition shall be verified by the affidavit of the claimant, his agent or attorney.

Petition dismissed, when

Sec. 160. The said allegations as to true allegiance and voluntary aiding, abetting, or giving encouragement to rebellion against the Government may be traversed by the Government, and if on the trial such issues shall be decided against the claimant, his petition shall be dismissed.

Burden of proof and evidence as to loyalty

Sec. 161. Whenever it is material in any claim to ascertain whether any person did or did not give any aid or comfort to forces or government of the late Confederate States during the Civil War, the claimant asserting the loyalty of any such person to the United States during such Civil War shall be required to prove affirmatively that such person did, during said Civil War, consistently adhere to the United States and did give no aid or comfort to persons engaged in said Confederate service in said Civil War.

Claims for proceeds arising from sales of abandoned property

Sec. 162. The Court of Claims shall have jurisdiction to hear and determine the claims of those whose property was taken subsequent to June the first, eighteen hundred and sixty-five, under the provisions of the Act of Congress approved March twelfth, eighteen hun-

dred and sixty-three, entitled "An Act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States," and Acts amendatory thereof where the property so taken was sold and the net proceeds thereof were placed in the Treasury of the United States; and the Secretary of the Treasury shall return said net proceeds to the owners thereof, on the judgment of said court, and full jurisdiction is given to said court to adjudge said claims, any statutes of limitations to the contrary notwithstanding.

Commissioners to take testimony

Sec. 163. The Court of Claims shall have power to appoint commissioners to take testimony to be used in the investigation of claims which come before it, to prescribe the fees which they shall receive for their services, and to issue commissions for the taking of such testimony, whether taken at the instance of the claimant or of the United States.

Power to call upon departments for information

Sec. 164. The said court shall have power to call upon any of the departments for any information or papers it may deem necessary, and shall have the use of all recorded and printed reports made by the committees of each House of Congress, when deemed necessary in the prosecution of its business. But the head of any department may refuse and omit to comply with any call for information or papers when, in his opinion, such compliance would be injurious to the public interest.

When testimony not to be taken

Sec. 165. When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not authorize the taking of any testimony therein.

Examination of claimant

Sec. 166. The court may, at the instance of the attorney or solicitor appearing in behalf of the United States, make an order in any case pending therein, directing any claimant in such case to appear, upon reasonable notice, before any commissioner of the court and be examined on oath touching any or all matters pertaining to said claim. Such examination shall be reduced to writing by the said commissioner, and be returned to and filed in the court, and may, at the discretion of the attorney or solicitor of the United States appearing in the case, be read and used as evidence on the trial thereof. And if any claimant, after such order is made and due and reasonable notice thereof is given to him, fails to appear, or refuses to testify or answer fully as to all matters within his knowledge material to the issue, the court may, in its discretion, order that the said cause shall not be brought forward for trial until he shall have fully complied with the order of the court in the premises.

Testimony; where taken

Sec. 167. The testimony in cases pending before the Court of Claims shall be taken in the county where the witness resides, when the same can be conveniently done.

Witnesses before commissioners

Sec. 168. The Court of Claims may issue subpœnas to require the attendance of witnesses in order to be examined before any person commissioned to take testimony therein. Such subpœnas shall have the same force as if issued from a district court, and compliance therewith shall be compelled under such rules and orders as the court shall establish.

Cross-examinations

Sec. 169. In taking testimony to be used in support of any claim, opportunity shall be given to the United States to file interrogatories, or by attorney to examine witnesses, under such regulations as said court shall prescribe; and like opportunity shall be afforded the claimant, in cases where testimony is taken on behalf of the United States, under like regulations.

Witnesses; how sworn

Sec. 170. The commissioner taking testimony to be used in the Court of Claims shall administer an oath or affirmation to the witnesses brought before him for examination.

Fees of commissioners, by whom paid

Sec. 171. When testimony is taken for the claimant, the fees of the commissioner before whom it is taken, and the cost of the commission and notice, shall be paid by such claimant; and when it is taken at the instance of the Government, such fees shall be paid out of the contingent fund provided for the Court of Claims, or other appropriation made by Congress for that purpose.

Claims forfeited for fraud

Sec. 172. Any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance of any claim or of any part of any claim against the United States shall, ipso facto, forfeit the same to the Government; and it shall be the duty of the Court of Claims, in such cases, to find specifically that such fraud was practiced or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the Government, and that the claimant be forever barred from prosecuting the same.

Claims under act of June 16, 1874

Sec. 173. No claim shall be allowed by the accounting officers under the provisions of the Act of Congress approved June sixteenth, eighteen hundred and seventy-four, or by the Court of Claims, or by Congress, to any person where such claimant, or those under whom

he claims, shall willfully, knowingly, and with intent to defraud the United States, have claimed more than was justly due in respect of such claim, or presented any false evidence to Congress, or to any department or court, in support thereof.

New trial on motion of claimant

Sec. 174. When judgment is rendered against any claimant, the court may grant a new trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.

New trial on motion of United States

Sec. 175. The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion, on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law.

Cost of printing record

Sec. 176. There shall be taxed against the losing party in each and every cause pending in the Court of Claims the cost of printing the record in such case, which shall be collected, except when the judgment is against the United States, by the clerk of said court and paid into the Treasury of the United States.

No interest on claims

Sec. 177. No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest.

Effect of payment of judgment

Sec. 178. The payment of the amount due by any judgment of the Court of Claims, and of any interest thereon allowed by law, as provided by law, shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy.

Final judgments a bar

Sec. 179. Any final judgment against the claimant on any claim prosecuted as provided in this chapter shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy.

Debtors to the United States may have amount due ascertained

Sec. 180. Whenever any person shall present his petition to the Court of Claims alleging that he is or has been indebted to the Unit-

ed States as an officer or agent thereof, or by virtue of any contract therewith, or that he is the guarantor, or surety, or personal representative of any officer or agent or contractor so indebted, or that he or the person for whom he is such surety, guarantor, or personal representative has held any office or agency under the United States, or entered into any contract therewith, under which it may be or has been claimed that an indebtedness to the United States had arisen and exists, and that he or the person he represents has applied to the proper department of the Government requesting that the account of such office, agency, or indebtedness may be adjusted and settled, and that three years have elapsed from the date of such application, and said account still remains unsettled and unadjusted, and that no suit upon the same has been brought by the United States, said court shall, due notice first being given to the head of said department and to the Attorney General of the United States, proceed to hear the parties and to ascertain the amount, if any, due the United States on said account. The Attorney General shall represent the United States at the hearing of said cause. The court may postpone the same from time to time whenever justice shall require. The judgment of said court or of the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. The payment of such amount so found due by the court shall discharge such obligation. An action shall accrue to the United States against such principal, or surety, or representative to recover the amount so found due, which may be brought at any time within three years after the final judgment of said court; and unless suit shall be brought within said time, such claim and the claim on the original indebtedness shall be forever barred. The provisions of section one hundred and sixty-six shall apply to cases under this section.

Appeals

Sec. 181. The plaintiff or the United States, in any suit brought under the provision of the section last preceding, shall have the same right of appeal as is conferred under sections two hundred and forty-two and two hundred and forty-three; and such right shall be exercised only within the time and in the manner therein prescribed.

Appeals in Indian cases

Sec. 182. In any case brought in the Court of Claims under any Act of Congress by which that court is authorized to render a judgment or decree against the United States, or against any Indian tribe or any Indians, or against any fund held in trust by the United States for any Indian tribe or for any Indians, the claimant, or the United States, or the tribe of Indians, or other party in interest shall have the same right of appeal as is conferred under sections two hundred and forty-two and two hundred and forty-three; and such right shall be exercised only within the time and in the manner therein prescribed.

Attorney General's report to Congress

Sec. 183. The Attorney-General shall report to Congress, at the beginning of each regular session, the suits under section one hundred and eighty, in which a final judgment or decree has been rendered, giving the date of each and a statement of the costs taxed in each case.

Loyalty a jurisdictional fact in certain cases

Sec. 184. In any case of a claim for supplies or stores taken by or furnished to any part of the military or naval forces of the United States for their use during the late Civil War, the petition shall aver that the person who furnished such supplies or stores, or from whom such supplies or stores were taken, did not give any aid or comfort to said rebellion, but was throughout that war loyal to the Government of the United States, and the fact of such loyalty shall be a jurisdictional fact; and unless the said court shall, on a preliminary inquiry, find that the person who furnished such supplies or stores, or from whom the same were taken as aforesaid, was loyal to the Government of the United States throughout said war, the court shall not have jurisdiction of such cause, and the same shall, without further proceedings, be dismissed.

Attorney General to appear for the defense

Sec. 185. The Attorney-General, or his assistants under his direction, shall appear for the defense and protection of the interests of the United States in all cases which may be transmitted to the Court of Claims under the provisions of this chapter, with the same power to interpose counter claims, offsets, defenses for fraud practiced or attempted to be practiced by claimants, and other defenses, in like manner as he is required to defend the United States in said court.

Persons not to be excluded as witnesses on account of color or because of interest; plaintiff may be witness for Government

Sec. 186. No person shall be excluded as a witness in the Court of Claims on account of color, or because he or she is a party to or interested in the cause or proceeding; and any plaintiff or party in interest may be examined as a witness on the part of the Government. (As amended February 5, 1912, 37 Stat. 61.)

Reports of court to Congress

Sec. 187. Reports of the Court of Claims to Congress, under sections one hundred and forty-eight and one hundred and fifty-one, if not finally acted upon during the session at which they are reported, shall be continued from session to session and from Congress to Congress until the same shall be finally acted upon.

CHAPTER EIGHT

THE COURT OF CUSTOMS APPEALS

Sec.
188. Court of Customs Appeals; appointment and salary of judges; quorum; circuit and district judges may act in place of judge disqualified, etc.
189. Court to be always open for business; terms may be held in any circuit; when expenses of judges to be paid.
190. Marshal of the court; appointment, salary, and duties.
191. Clerk of the court; appointment, salary, and duties.
192. Assistant clerk, stenographic clerks, and reporter; appointment, salary, and duties.
193. Rooms for holding court to be provided; bailiffs and messengers.
194. To be a court of record; to prescribe form and style of seal, and establish rules and regulations; may affirm, modify, or reverse and remand case, etc.
195. Final decisions of Board of General Appraisers to be reviewed only by Customs Court.
196. Other courts deprived of jurisdiction in customs cases; pending cases excepted.
197. Transfer to Customs Court of pending cases; completion of testimony.
198. Appeals from Board of General Appraisers; time within which to be taken; record to be transmitted to Customs Court.
199. Records filed in Customs Court to be at once placed on calendar; calendar to be called every sixty days.

Court of Customs Appeals; appointment and salary of judges; quorum; circuit and district judges may act in place of judge disqualified, etc.

Sec. 188. There shall be a United States Court of Customs Appeals, which shall consist of a presiding judge and four associate judges, each of whom shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive a salary of seven thousand dollars a year. The presiding judge shall be so designated in the order of appointment and in the commission issued to him by the President; and the associate judges shall have precedence according to the date of their commissions. Any three members of said court shall constitute a quorum, and the concurrence of three members shall be necessary to any decision thereof. In case of a vacancy or of the temporary inability or disqualification, for any reason, of one or two of the judges of said court, the President may, upon the request of the presiding judge of said court, designate any qualified United States circuit or district judge or judges to act in his or their place; and such circuit or district judges shall be duly qualified to so act.

Court to be always open for business; terms may be held in any circuit; when expenses of judges to be paid

Sec. 189. The said Court of Customs Appeals shall always be open for the transaction of business, and sessions thereof may, in the discretion of the court, be held in the several judicial circuits, and at

such places as said court may from time to time designate. Any judge who, in pursuance of the provisions of this chapter, shall attend a session of said court at any place other than the city of Washington, shall be paid, upon his written and itemized certificate, by the marshal of the district in which the court shall be held, his actual and necessary expenses incurred for travel and attendance, and the actual and necessary expenses of one stenographic clerk who may accompany him; and such payments shall be allowed the marshal in the settlement of his accounts with the United States.

Marshal of the court; appointment, salary, and duties

Sec. 190. Said court shall have the services of a marshal, with the same duties and powers, under the regulations of the court, as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. Said services within the District of Columbia shall be performed by a marshal to be appointed by and to hold office during the pleasure of the court, who shall receive a salary of three thousand dollars per annum. Said services outside of the District of Columbia shall be performed by the United States marshals in and for the districts where sessions of said court may be held; and to this end said marshals shall be the marshals of said court. The marshal of said court, for the District of Columbia, is authorized to purchase, under the direction of the presiding judge, such books, periodicals, and stationery, as may be necessary for the use of said court; and such expenditures shall be allowed and paid by the Secretary of the Treasury upon claim duly made and approved by said presiding judge.

Clerk of the court; appointment, salary, and duties

Sec. 191. The court shall appoint a clerk, whose office shall be in the city of Washington, District of Columbia, and who shall perform and exercise the same duties and powers in regard to all matters within the jurisdiction of said court as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the clerk shall be three thousand five hundred dollars per annum, which sum shall be in full payment for all service rendered by such clerk; and all fees of any kind whatever, and all costs shall be by him turned into the United States Treasury. Said clerk shall not be appointed by the court or any judge thereof as a commissioner, master, receiver, or referee. The costs and fees in the said court shall be fixed and established by said court in a table of fees to be adopted and approved by the Supreme Court of the United States within four months after the organization of said court: Provided, That the costs and fees so fixed shall not, with respect to any item, exceed the costs and fees charged in the Supreme Court of the United States; and the same shall be expended, accounted for, and paid over to the Treasury of the United States.

Assistant clerk, stenographic clerks, and reporter; appointment, salary, and duties

Sec. 192. In addition to the clerk, the court may appoint an assistant clerk at a salary of two thousand dollars per annum, five stenographic clerks at a salary of one thousand six hundred dollars per annum each, one stenographic reporter at a salary of two thousand five hundred dollars per annum, and a messenger at a salary of eight hundred and forty dollars per annum, all payable in equal monthly installments, and all of whom, including the clerk, shall hold office during the pleasure of and perform such duties as are assigned them by the court. Said reporter shall prepare and transmit to the Secretary of the Treasury once a week in time for publication in the Treasury Decisions copies of all decisions rendered to that date by said court, and prepare and transmit, under the direction of said court, at least once a year, reports of said decisions rendered to that date, constituting a volume, which shall be printed by the Treasury Department in such numbers and distributed or sold in such manner as the Secretary of the Treasury shall direct.

Rooms for holding court to be provided; bailiffs and messengers

Sec. 193. The marshal of said court for the District of Columbia and the marshals of the several districts in which said Court of Customs Appeals may be held shall, under the direction of the Attorney General, and with his approval, provide such rooms in the public buildings of the United States as may be necessary for said court: Provided, That in case proper rooms can not be provided in such buildings, then the said marshals, with the approval of the Attorney-General, may, from time to time, lease such rooms as may be necessary for said court. The bailiffs and messengers of said court shall be allowed the same compensation for their respective services as are allowed for similar services in the existing district courts. In no case shall said marshals secure other rooms than those regularly occupied by existing district courts, or other public officers, except where such can not, by reason of actual occupancy or use, be occupied or used by said Court of Customs Appeals.

To be a court of record; to prescribe form and style of seal, and establish rules and regulations; may affirm, modify, or reverse and remand case, etc.

Sec. 194. The said Court of Customs Appeals shall be a court of record, with jurisdiction as in this chapter established and limited. It shall prescribe the form and style of its seal, and the form of its writs and other process and procedure, and exercise such powers conferred by law as may be conformable and necessary to the exercise of its jurisdiction. It shall have power to establish all rules and regulations for the conduct of the business of the court, and as may be needful for the uniformity of decisions within its jurisdiction as conferred by law. It shall have power to review any decision or matter within its jurisdiction, and may affirm, modify, or reverse the

same and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly.

Final decisions of Board of General Appraisers to be reviewed only by Customs Court

Sec. 195. The Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgments and decrees of said Court of Customs Appeals shall be final in all such cases.

Other courts deprived of jurisdiction in customs cases; pending cases excepted

Sec. 196. After the organization of said court, no appeal shall be taken or allowed from any Board of United States General Appraisers to any other court, and no appellate jurisdiction shall thereafter be exercised or allowed by any other courts in cases decided by said Board of United States General Appraisers; but all appeals allowed by law from such Board of General Appraisers shall be subject to review only in the Court of Customs Appeals hereby established, according to the provisions of this chapter: Provided, That nothing in this chapter shall be deemed to deprive the Supreme Court of the United States of jurisdiction to hear and determine all customs cases which have heretofore been certified to said court from the United States circuit courts of appeals on applications for writs of certiorari or otherwise, nor to review by writ of certiorari any customs case heretofore decided or now pending and hereafter decided by any circuit court of appeals, provided application for said writ be made within six months after August fifth, nineteen hundred and nine: Provided further, That all customs cases decided by a circuit or district court of the United States or a court of a Territory of the United States prior to said date above mentioned, and which have not been removed from said courts by appeal or writ of error, and all such cases theretofore submitted for decision in said courts and remaining undecided may be reviewed on appeal at the instance of either party by the United States Court of Customs Appeals, provided such appeal be taken within one year from the date of the entry of the order, judgment, or decrees sought to be reviewed.

Transfer to Customs Court of pending cases; completion of testimony

Sec. 197. Immediately upon the organization of the Court of Customs Appeals, all cases within the jurisdiction of that court pending

and not submitted for decision in any of the United States circuit courts of appeals, United States circuit, territorial or district courts, shall, with the record and samples therein, be certified by said courts to said Court of Customs Appeals for further proceedings in accordance herewith: Provided, That where orders for the taking of further testimony before a referee have been made in any of such cases, the taking of such testimony shall be completed before such certification.

Appeals from Board of General Appraisers; time within which to be taken; record to be transmitted to Customs Court

Sec. 198. If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision: Provided, That in Alaska and in the insular and other outside possessions of the United States ninety days shall be allowed for making such application to the Court of Customs Appeals. Such application shall be made by filing in the office of the clerk of said court a concise statement of errors of law and fact complained of; and a copy of such statement shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be. Thereupon the court shall immediately order the Board of General Appraisers to transmit to said court the record and evidence taken by them, together with the certified statement of the facts involved in the case and their decision thereon; and all the evidence taken by and before said board shall be competent evidence before said Court of Customs Appeals. The decision of said Court of Customs Appeals shall be final, and such cause shall be remanded to said Board of General Appraisers for further proceedings to be taken in pursuance of such determination.

Records filed in Customs Court to be at once placed on calendar; calendar to be called every sixty days

Sec. 199. Immediately upon receipt of any record transmitted to said court for determination the clerk thereof shall place the same upon the calendar for hearing and submission; and such calendar shall be called and all cases thereupon submitted, except for good cause shown, at least once every sixty days: Provided, That such calendar need not be called during the months of July and August of any year.

CHAPTER NINE

THE COMMERCE COURT

[This court is abolished by the urgent Deficiency Appropriation Bill of October 22, 1913. But the chapter is retained because it is necessary for a proper understanding of the transfer of jurisdiction. The portion of the act abolishing it is printed post, p. 701.]

Sec.
200. Commerce Court created; judges of, appointment and designation; expense allowance to judges.
201. Additional circuit judges; appointment and assignment.
202. Officers of the court; clerk, marshal, etc.; salaries, etc.
203. Court to be always open for business; sessions of, to be held in Washington and elsewhere.
204. Marshals to provide rooms for holding court outside of Washington.
205. Assignment of judges to other duty; vacancies, how filled.
206. Powers of court and judges; writs, process, procedure, etc.
207. Jurisdiction of the court.
208. Suits to enjoin, etc., orders of Interstate Commerce Commission to be against United States; restraining orders, when granted without notice.
209. Jurisdiction of the court, how invoked; practice and procedure.
210. Final judgments and decrees reviewable in Supreme Court.
211. Suits to be against United States; when United States may intervene.
212. Attorney General to control all cases; Interstate Commerce Commission may appear as of right; parties interested may intervene, etc.
213. Complainants may appear and be made parties to case.
214. Pending cases to be transferred to Commerce Court; exception; status of transferred cases.

Commerce Court created; judges of, appointment and designation; expense allowance to judges

Sec. 200. There shall be a court of the United States, to be known as the Commerce Court, which shall be a court of record, and shall have a seal of such form and style as the court may prescribe. The said court shall be composed of five judges, to be from time to time designated and assigned thereto by the Chief Justice of the United States, from among the circuit judges of the United States, for the period of five years, except that in the first instance the court shall be composed of the five additional circuit judges referred to in the next succeeding section, who shall be designated by the President to serve for one, two, three, four, and five years, respectively, in order that the period of designation of one of the said judges shall expire in each year thereafter. In case of the death, resignation, or termination of assignment of any judge so designated, the Chief Justice shall designate a circuit judge to fill the vacancy so caused and to serve during the unexpired period for which the original designation was made. After the year nineteen hundred and fourteen no circuit judge shall be redesignated to serve in the Commerce Court until the expiration of at least one year after the

expiration of the period of his last previous designation. The judge first designated for the five-year period shall be the presiding judge of said court, and thereafter the judge senior in designation shall be the presiding judge. The associate judges shall have precedence and shall succeed to the place and powers of the presiding judge whenever he may be absent or incapable of acting in the order of the date of their designations. Four of said judges shall constitute a quorum, and at least a majority of the court shall concur in all decisions. Each of the judges during the period of his service in the Commerce Court shall, on account of the regular sessions of the court being held in the city of Washington, receive in addition to his salary as circuit judge an expense allowance at the rate of one thousand five hundred dollars per annum.

Additional circuit judges; appointment and assignment

Sec. 201. The five additional circuit judges authorized by the Act to create a Commerce Court, and for other purposes, approved June eighteenth, nineteen hundred and ten, shall hold office during good behavior, and from time to time shall be designated and assigned by the Chief Justice of the United States for service in the district court of any district, or the circuit court of appeals for any circuit, or in the Commerce Court, and when so designated and assigned for service in a district court or circuit court of appeals shall have the powers and jurisdiction in this Act conferred upon a circuit judge in his circuit.

Officers of the court; clerk, marshal, etc.; salaries, etc.

Sec. 202. The court shall also have a clerk and a marshal, with the same duties and powers, so far as they may be appropriate and are not altered by rule of the court, as are now possessed by the clerk and marshal, respectively, of the Supreme Court of the United States. The offices of the clerk and marshal of the court shall be in the city of Washington, in the District of Columbia. The judges of the court shall appoint the clerk and marshal, and may also appoint, if they find it necessary, a deputy clerk and deputy marshal; and such clerk, marshal, deputy clerk, and deputy marshal, shall hold office during the pleasure of the court. The salary of the clerk shall be four thousand dollars per annum; the salary of the marshal three thousand dollars per annum; the salary of the deputy clerk two thousand five hundred dollars per annum; and the salary of the deputy marshal two thousand five hundred dollars per annum. The said clerk and marshal may, with the approval of the court, employ all requisite assistance. The costs and fees in said court shall be established by the court in a table thereof, approved by the Supreme Court of the United States, within four months after the organization of the court; but such costs and fees shall in no case exceed those charged in the Supreme Court of the United States, and shall be accounted for and paid into the Treasury of the United States.

Court to be always open for business; sessions of, to be held in Washington and elsewhere

Sec. 203. The Commerce Court shall always be open for the transaction of business. Its regular sessions shall be held in the city of Washington, in the District of Columbia; but the powers of the court or of any judge thereof, or of the clerk, marshal, deputy clerk, or deputy marshal, may be exercised anywhere in the United States; and for expedition of the work of the court and the avoidance of undue expense or inconvenience to suitors the court shall hold sessions in different parts of the United States as may be found desirable. The actual and necessary expenses of the judges, clerk, marshal, deputy clerk, and deputy marshal of the court incurred for travel and attendance elsewhere than in the city of Washington shall be paid upon the written and itemized certificate of such judge, clerk, marshal, deputy clerk, or deputy marshal, by the marshal of the court, and shall be allowed to him in the settlement of his accounts with the United States.

Marshals to provide rooms for holding court outside of Washington

Sec. 204. The United States marshals of the several districts outside of the city of Washington in which the Commerce Court may hold its sessions shall provide, under the direction and with the approval of the Attorney General, such rooms in the public buildings of the United States as may be necessary for the court's use; but in case proper rooms can not be provided in such public buildings, said marshals, with the approval of the Attorney General, may then lease from time to time other necessary rooms for the court.

Assignment of judges to other duty; vacancies, how filled

Sec. 205. If, at any time, the business of the Commerce Court does not require the services of all the judges, the Chief Justice of the United States may, by writing, signed by him and filed in the Department of Justice, terminate the assignment of any of the judges or temporarily assign him for service in any district court or circuit court of appeals. In case of illness or other disability of any judge assigned to the Commerce Court the Chief Justice of the United States may assign any other circuit judge of the United States to act in his place, and may terminate such assignment when the exigency therefor shall cease; and any circuit judge so assigned to act in place of such judge shall, during his assignment, exercise all the powers and perform all the functions of such judge.

Powers of court and judges; writs, process, procedure, etc.

Sec. 206. In all cases within its jurisdiction the Commerce Court, and each of the judges assigned thereto, shall, respectively, have and may exercise any and all of the powers of a district court of the United States and of the judges of said court, respectively, so far as

the same may be appropriate to the effective exercise of the jurisdiction hereby conferred. The Commerce Court may issue all writs and process appropriate to the full exercise of its jurisdiction and powers and may prescribe the form thereof. It may also, from time to time, establish such rules and regulations concerning pleading, practice, or procedure in cases or matters within its jurisdiction as to the court shall seem wise and proper. Its orders, writs, and process may run, be served, and be returnable anywhere in the United States; and the marshal and deputy marshal of said court and also the United States marshals and deputy marshals in the several districts of the United States shall have like powers and be under like duties to act for and in behalf of said court as pertain to United States marshals and deputy marshals generally when acting under like conditions concerning suits or matters in the district courts of the United States.

Jurisdiction of the court

Sec. 207. The Commerce Court shall have the jurisdiction possessed by circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds:

First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

Third. Such cases as by section three of the Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

Fourth. All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States.

Nothing contained in this chapter shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the Commerce Court.

The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this chapter shall not affect the jurisdiction possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes.

Suits to enjoin, etc., orders of Interstate Commerce Commission to be against United States; restraining orders, when granted without notice

Sec. 208. Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the Commerce Court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit. No order or injunction so restraining or suspending an order of the Interstate Commerce Commission shall be made by the Commerce Court otherwise than upon notice and after hearing, except that in cases where irreparable damage would otherwise ensue to the petitioner, said court, or a judge thereof may, on hearing after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension in whole or in part of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of such court or judge, pending application to the court for its order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judge making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until its decision upon the application.

Jurisdiction of the court, how invoked; practice and procedure

Sec. 209. The jurisdiction of the Commerce Court shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the Commerce Court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office, and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must

be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court; and may prescribe that the evidence be taken before a single judge of the court, with power to rule upon the admission of evidence. Except as may be otherwise provided in this chapter, or by rule of the court, the practice and procedure in the Commerce Court shall conform as nearly as may be to that in like cases in a district court of the United States.

Final judgments and decrees reviewable in Supreme Court

Sec. 210. A final judgment or decree of the Commerce Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of said final judgment or decree. Such appeal may be taken in like manner as appeals from a district court of the United States to the Supreme Court, and the Commerce Court may direct the original record to be transmitted on appeal instead of a transcript thereof. The Supreme Court may affirm, reverse, or modify the final judgment or decree of the Commerce Court as the case may require. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the Commerce Court appealed from, unless the Supreme Court or a justice thereof shall so direct; and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. An appeal may also be taken to the Supreme Court of the United States from an interlocutory order or decree of the Commerce Court granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission, provided such appeal be taken within thirty days from the entry of such order or decree. Appeals to the Supreme Court under this section shall have priority in hearing and determination over all other causes except criminal causes in that court.

Suits to be against United States; when United States may intervene

Sec. 211. All cases and proceedings in the Commerce Court which but for this chapter would be brought by or against the Interstate Commerce Commission, shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the Commerce Court whenever, though it has not been made a party, public interests are involved.

Attorney General to control all cases; Interstate Commerce Commission may appear as of right; parties interested may intervene, etc.

Sec. 212. The Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the

Commerce Court, and in the Supreme Court of the United States upon appeal from the Commerce Court. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: Provided, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits: Provided further, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by any one under the provisions of this chapter, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General therein.

Complainants may appear and be made parties to case

Sec. 213. Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States.

Pending cases to be transferred to Commerce Court; exception; status of transferred cases

Sec. 214. Until the opening of the Commerce Court, all cases and proceedings of which from that time the Commerce Court is hereby given exclusive jurisdiction may be brought in the same courts and conducted in like manner and with like effect as is now provided by law; and if any such case or proceeding shall have gone to final judgment or decree before the opening of the Commerce Court, appeal

may be taken from such final judgment or decree in like manner and with like effect as is now provided by law. Any such case or proceeding within the jurisdiction of the Commerce Court which may have been begun in any other court as hereby allowed, before the said date, shall be forthwith transferred to the Commerce Court, if it has not yet proceeded to final judgment or decree in such other court unless it has been finally submitted for the decision of such court, in which case the cause shall proceed in such court to final judgment or decree and further proceeding thereafter, and appeal may be taken direct to the Supreme Court; and if remanded, such cause may be sent back to the court from which the appeal was taken or to the Commerce Court for further proceeding as the Supreme Court shall direct. All previous proceedings in such transferred case shall stand and operate notwithstanding the transfer, subject to the same control over them by the Commerce Court and to the same right of subsequent action in the case or proceeding as if the transferred case or proceeding had been originally begun in the Commerce Court. The clerk of the court from which any case or proceeding is so transferred to the Commerce Court shall transmit to and file in the Commerce Court the originals of all papers filed in such case or proceeding and a certified transcript of all record entries in the case or proceeding up to the time of transfer.

CHAPTER TEN

THE SUPREME COURT

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254. Cost of printing records.
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Number of justices

Sec. 215. [See ante, p. 495.]

Precedence of the associate justices

Sec. 216. The associate justices shall have precedence according to the dates of their commissions, or, when the commissions of two or more of them bear the same date, according to their ages.

Vacancy in the office of Chief Justice

Sec. 217. In case of a vacancy in the office of Chief Justice, or of his inability to perform the duties and powers of his office, they shall devolve upon the associate justice who is first in precedence, until such disability is removed, or another Chief Justice is appointed and duly qualified. This provision shall apply to every associate justice who succeeds to the office of Chief Justice.

Salaries of justices

Sec. 218. The Chief Justice of the Supreme Court of the United States shall receive the sum of fifteen thousand dollars a year, and the justices thereof shall receive the sum of fourteen thousand five hundred dollars a year each, to be paid monthly.

Clerk, marshal, and reporter

Sec. 219. The Supreme Court shall have power to appoint a clerk and a marshal for said court, and a reporter of its decisions.

The clerk to give bond

Sec. 220. The clerk of the Supreme Court shall, before he enters upon the execution of his office, give bond, with sufficient sureties, to be approved by the court, to the United States, in the sum of not less than five thousand and not more than twenty thousand dollars,

to be determined and regulated by the Attorney General, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court. The Supreme Court may at any time, upon the motion of the Attorney General, to be made upon thirty days' notice, require a new bond, or a bond for an increased amount within the limits above prescribed; and the failure of the clerk to execute the same shall vacate his office. All bonds given by the clerk shall, after approval, be recorded in his office, and copies thereof from the records, certified by the clerk under seal of the court, shall be competent evidence in any court. The original bonds shall be filed in the Department of Justice.

Deputies of the clerk

Sec. 221. One or more deputies of the clerk of the Supreme Court may be appointed by the court on the application of the clerk, and may be removed at the pleasure of the court. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk in his name until a clerk is appointed and qualified; and for the defaults or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk, and his estate, and the sureties on his official bond shall be liable; and his executor or administrator shall have such remedy for any such defaults or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.

Records of the old court of appeals

Sec. 222. The records and proceedings of the court of appeals, appointed previous to the adoption of the present Constitution, shall be kept in the office of the clerk of the Supreme Court, who shall give copies thereof to any person requiring and paying for them, in the manner provided by law for giving copies of the records and proceedings of the Supreme Court; and such copies shall have like faith and credit with all other proceedings of said court.

Tables of fees

Sec. 223. The Supreme Court is authorized and empowered to prepare the tables of fees to be charged by the clerk thereof.

Marshal of the Supreme Court

Sec. 224. The marshal is entitled to receive a salary at the rate of four thousand five hundred dollars a year. He shall attend the court at its sessions; shall serve and execute all process and orders issuing from it, or made by the Chief Justice or an associate justice in pursuance of law; and shall take charge of all property of the United States used by the court or its members. With the approval of the Chief Justice he may appoint assistants and messengers to attend the court, with the compensation allowed to officers of the House of Representatives of similar grade.

Duties of the reporter

Sec. 225. The reporter shall cause the decisions of the Supreme Court to be printed and published within eight months after they are made; and within the same time he shall deliver three hundred copies of the volumes of said reports to the Attorney General. The reporter shall, in any year when he is so directed by the court, cause to be printed and published a second volume of said decisions, of which he shall deliver a like number of copies in like manner and time.

Reporter's salary and allowances

Sec. 226. The reporter shall be entitled to receive from the Treasury an annual salary of four thousand five hundred dollars when his report of said decisions constitutes one volume, and an additional sum of one thousand two hundred dollars when, by direction of the court, he causes to be printed and published in any year a second volume; and said reporter shall be annually entitled to clerk hire in the sum of one thousand two hundred dollars, and to office rent, stationery, and contingent expenses in the sum of six hundred dollars: Provided, That the volumes of the decisions of the court heretofore published shall be furnished by the reporter to the public at a sum not exceeding two dollars per volume, and those hereafter published at a sum not exceeding one dollar and seventy-five cents per volume; and the number of volumes now required to be delivered to the Attorney General shall be furnished by the reporter without any charge therefor. Said salary and compensation, respectively, shall be paid only when he causes such decisions to be printed, published, and delivered within the time and in the manner prescribed by law, and upon the condition that the volumes of said reports shall be sold by him to the public for a price not exceeding one dollar and seventy-five cents a volume.

Distribution of reports and digests

Sec. 227. The Attorney General shall distribute copies of the Supreme Court reports, as follows: To the President, the justices of the Supreme Court, the judges of the Commerce Court, the judges of the Court of Customs Appeals, the judges of the circuit courts of appeals, the judges of the district courts, the judges of the Court of Claims, the judges of the Court of Appeals and of the Supreme Court of the District of Columbia, the judges of the several Territorial courts, the Secretary of State, the Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Postmaster General, the Attorney General, the Secretary of Agriculture, the Secretary of Commerce and Labor, the Solicitor General, the Assistant to the Attorney General, each Assistant Attorney General, each United States district attorney, each Assistant Secretary of each Executive Department, the Assistant Postmasters General, the Secretary of the Senate for the use of the Senate, the Clerk of the House of Representatives for the use of the

House of Representatives, the Governors of the Territories, the Solicitor for the Department of State, the Treasurer of the United States, the Solicitor of the Treasury, the Register of the Treasury, the Comptroller of the Treasury, the Comptroller of the Currency, the Commissioner of Internal Revenue, the Director of the Mint, each of the six Auditors in the Treasury Department, the Judge Advocate General, War Department, the Paymaster General, War Department, the Judge Advocate General, Navy Department, the Commissioner of Indian Affairs, the Commissioner of Pensions, the Commissioner of the General Land Office, the Commissioner of Patents, the Commissioner of Education, the Commissioner of Labor, the Commissioner of Navigation, the Commissioner of Corporations, the Commissioner General of Immigration, the Chief of the Bureau of Manufactures, the Director of the Geological Survey, the Director of the Census, the Forester, Department of Agriculture, the Purchasing Agent, Post Office Department, the Interstate Commerce Commission, the Clerk of the Supreme Court of the United States, the Marshal of the Supreme Court of the United States, the Attorney for the District of Columbia, the Naval Academy at Annapolis, the Military Academy at West Point, and the heads of such other executive offices as may be provided by law, of equal grade with any of said offices, each one copy; to the Law Library of the Supreme Court, twenty-five copies; to the Law Library of the Department of the Interior, two copies; to the Law Library of the Department of Justice, two copies; to the Secretary of the Senate for the use of the committees of the Senate, twenty-five copies; to the Clerk of the House of Representatives for the use of the committees of the House, thirty copies; to the Marshal of the Supreme Court of the United States, as custodian of the public property used by the court, for the use of the justices thereof in the conference room, robing room, and court room, three copies; to the Secretary of War for the use of the proper courts and officers of the Philippine Islands and for the headquarters of military departments in the United States, twelve copies; and to each of the places where district courts of the United States are now holden, including Hawaii, and Porto Rico, one copy. He shall also distribute one complete set of said reports, and one set of the digests thereof, to such executive officers as are entitled to receive said reports under this section and have not already received them, to each United States judge and to each United States district attorney who has not received a set, to each of the places where district courts are now held to which said reports have not been distributed, and to each of the places at which a district court may hereafter be held, the edition of said reports and digests to be selected by the judge or officer receiving them. No distribution of reports and digests under this section shall be made to any place where the court is held in a building not owned by the United States, unless there be at such place a United States officer to whose responsible custody

they can be committed. The clerks of said courts (except the Supreme Court) shall in all cases keep said reports and digest for the use of the courts and of the officers thereof. Such reports and digest shall remain the property of the United States, and shall be preserved by the officers above named and by them turned over to their successors in office.

[Distribution of reports to libraries of circuit courts of appeals]

[Sec. 227a.] * * * That the Secretary of the Interior shall hereafter distribute the Supreme Court Reports to the libraries of the United States circuit courts of appeals.

Additional reports and digests; limitation upon cost; estimates to be submitted to Congress annually

Sec. 228. The publishers of the decisions of the Supreme Court shall deliver to the Attorney General, in addition to the three hundred copies delivered by the Reporter, such number of copies of each report heretofore published, as the Attorney General may require, for which he shall pay not more than two dollars per volume, and such number of copies of each report hereafter published as he may require, for which he shall pay not more than one dollar and seventy-five cents per volume. The Attorney General shall include in his annual estimates submitted to Congress, an estimate for the current volumes of such reports, and also for the additional sets of reports and digests required for distribution under the section last preceding.

Distribution of Federal Reporter, etc., and Digests

Sec. 229. The Attorney General is authorized to procure complete sets of the Federal Reporter or, in his discretion, other publication containing the decisions of the circuit courts of appeals, circuit courts, and district courts, and digests thereof, and also future volumes of the same as issued, and distribute a copy of each such reports and digests to each place where a circuit court of appeals, or a district court, is now or may hereafter regularly be held, and to the Supreme Court of the United States, the Court of Claims, the Court of Customs Appeals, the Commerce Court, the Court of Appeals and the Supreme Court of the District of Columbia, the Attorney General, the Solicitor General, the Solicitor of the Treasury, the Assistant Attorney General for the Department of the Interior, the Commissioner of Patents, and the Interstate Commerce Commission; and to the Secretary of the Senate, for the use of the Senate, and to the Clerk of the House of Representatives, for the use of the House of Representatives, not more than three sets each. Whenever any such court room, office, or officer shall have a partial or complete set of any such reports, or digests, already purchased or owned by the United States, the Attorney General shall distribute to such court room, office, or officer, only sufficient volumes to make

a complete set thereof. No distribution of reports or digests under this section shall be made to any place where the court is held in a building not owned by the United States, unless there be at such place a United States officer to whose responsible custody they can be committed. The clerks of the courts (except the Supreme Court) to which the reports and digests are distributed under this section, shall keep such reports and digests for the use of the courts and the officers thereof. All reports and digests distributed under the provisions of this section shall be and remain the property of the United States and, before distribution, shall be plainly marked on their covers with the words "The Property of the United States," and shall be transmitted by the officers receiving them to their successors in office. Not to exceed two dollars per volume shall be paid for the back and current volumes of the Federal Reporter or other publication purchased under the provisions of this section, and not to exceed five dollars per volume for the digest, the said money to be disbursed under the direction of the Attorney General; and the Attorney General shall include in his annual estimates submitted to Congress, an estimate for the back and current volumes of such reports and digests, the distribution of which is provided for in this section.

Terms

Sec. 230. The Supreme Court shall hold at the seat of government, one term annually, commencing on the second Monday in October, and such adjourned or special terms as it may find necessary for the dispatch of business.

Adjournment for want of a quorum

Sec. 231. If, at any session of the Supreme Court, a quorum does not attend on the day appointed for holding it, the justices who do attend may adjourn the court from day to day for twenty days after said appointed time, unless there be sooner a quorum. If a quorum does not attend within said twenty days, the business of the court shall be continued over till the next appointed session; and if, during a term, after a quorum has assembled, less than that number attend on any day, the justices attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

Certain orders made by less than quorum

Sec. 232. The justices attending at any term, when less than a quorum is present, may, within the twenty days mentioned in the preceding section, make all necessary orders touching any suit, proceeding, or process, depending in or returned to the court, preparatory to the hearing, trial, or decision thereof.

Original jurisdiction

Sec. 233. [See ante, p. 383.]

Writs of prohibition and mandamus

Sec. 234. The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party.

Issues of fact

Sec. 235. The trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury.

Appellate jurisdiction

Sec. 236. The Supreme Court shall have appellate jurisdiction in the cases hereinafter specially provided for.

Writs of error from judgments and decrees of State courts

Sec. 237. [See ante, p. 527.]

Appeals and writs of error from United States district courts

Sec. 238. [See ante, pp. 473, 497.]

Circuit court of appeals may certify questions to Supreme Court for instructions

Sec. 239. [See ante, pp. 471, 514.]

Certiorari to circuit court of appeals

Sec. 240. [See ante, pp. 472, 518.]

Appeals and writs of error in other cases

Sec. 241. [See ante, p. 520.]

Appeals from Court of Claims

Sec. 242. An appeal to the Supreme Court shall be allowed on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court as provided in section one hundred and seventy-two.

Time and manner of appeals from the Court of Claims

Sec. 243. All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the Supreme Court may direct.

Writs of error and appeals from Supreme Court of and United States district court for Porto Rico

Sec. 244. Writs of error and appeals from the final judgments and decrees of the supreme court of, and the United States district

court for, Porto Rico, may be taken and prosecuted to the Supreme Court of the United States, in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, or wherein the Constitution of the United States, or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied, without regard to the sum or value of the matter in dispute; and in all other cases in which the sum or value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars. Such writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken to the Supreme Court of the United States from the district courts.

Writs of error and appeals from the Supreme Courts of Arizona and New Mexico

Sec. 245. Writs of error and appeals from the final judgments and decrees of the supreme courts of the Territories of Arizona and New Mexico may be taken and prosecuted to the Supreme Court of the United States in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, without regard to the sum or value of the matter in dispute; and in all other cases in which the sum or value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars.

Writs of error and appeals from the Supreme Court of Hawaii

Sec. 246. Writs of error and appeals from the final judgments and decrees of the supreme court of the Territory of Hawaii may be taken and prosecuted to the Supreme Court of the United States, within the same time, in the same manner, under the same regulations, and in the same classes of cases, in which writs of error and appeals from the final judgments and decrees of the highest court of a State in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States under the provisions of section two hundred and thirty-seven; and also in all cases wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars.

Appeals and writs of error from the district court for Alaska direct to Supreme Court in certain cases

Sec. 247. Appeals and writs of error may be taken and prosecuted from final judgments and decrees of the district court for the district of Alaska or for any division thereof, direct to the Supreme

Court of the United States, in the following cases: In prize cases; and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Such writs of error and appeal shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the district courts to the Supreme Court.

Appeals and writs of error from the Supreme Court of the Philippine Islands

Sec. 248. The Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the supreme court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby, in which the Constitution, or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court on appeal or writ of error by the party aggrieved, within the same time, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the district courts of the United States.

Appeals and writs of error when a Territory becomes a State

Sec. 249. In all cases where the judgment or decree of any court of a territory might be reviewed by the Supreme Court on writ of error or appeal, such writ of error or appeal may be taken, within the time and in the manner provided by law, notwithstanding such Territory has, after such judgment or decree, been admitted as a State; and the Supreme Court shall direct the mandate to such court as the nature of the writ of error or appeal requires.

Appeals and writs of error from the Court of Appeals of the District of Columbia

Sec. 250. Any final judgment or decree of the court of appeals of the District of Columbia may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases:

First. In cases in which the jurisdiction of the trial court is in issue; but when any such case is not otherwise reviewable in said

Supreme Court, then the question of jurisdiction alone shall be certified to said Supreme Court for decision.

Second. In prize cases.

Third. In cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority.

Fourth. In cases in which the constitution, or any law of a State, is claimed to be in contravention of the Constitution of the United States.

Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.

Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant.

Except as provided in the next succeeding section, the judgments and decrees of said court of appeals shall be final in all cases arising under the patent laws, the copyright laws, the revenue laws, the criminal laws, and in admiralty cases; and except as provided in the next succeeding section, the judgments and decrees of said court of appeals shall be final in all cases not reviewable as hereinbefore provided.

Writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the circuit courts of appeals to the Supreme Court of the United States.

Certiorari to Court of Appeals, District of Columbia

Sec. 251. In any case in which the judgment or decree of said court of appeals is made final by the section last preceding, it shall be competent for the Supreme Court of the United States to require, by certiorari or otherwise, any such case to be certified to it for its review and determination, with the same power and authority in the case as if it had been carried by writ of error or appeal to said Supreme Court. It shall also be competent for said court of appeals, in any case in which its judgment or decree is made final under the section last preceding, at any time to certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for their proper decision; and thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon said court of appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

Appellate jurisdiction under the bankruptcy act

Sec. 252. [See ante, p. 523.]

Precedence of writs of error to State courts

Sec. 253. Cases on writ of error to revise the judgment of a State court in any criminal case shall have precedence on the docket of the Supreme Court, of all cases to which the Government of the United States is not a party, excepting only such cases as the court, in its discretion, may decide to be of public importance.

Cost of printing records

Sec. 254. There shall be taxed against the losing party in each and every cause pending in the Supreme Court the cost of printing the record in such case, except when the judgment is against the United States.

Women may be admitted to practice

Sec. 255. Any woman who shall have been a member of the bar of the highest court of any State or Territory, or of the court of appeals of the District of Columbia, for the space of three years, and shall have maintained a good standing before such court, and who shall be a person of good moral character, shall, on motion, and the production of such record, be admitted to practice before the Supreme Court of the United States.

CHAPTER ELEVEN

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Cases in which jurisdiction of United States courts shall be exclusive of State courts

Sec. 256. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States:

First. Of all crimes and offenses cognizable under the authority of the United States.

Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

Fifth. Of all cases arising under the patent-right, or copyright laws of the United States.

Sixth. Of all matters and proceedings in bankruptcy.

Seventh. Of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens.

Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls.

Oath of United States judges

Sec. 257. The justices of the Supreme Court, the circuit judges, and the district judges, hereafter appointed, shall take the following oath before they proceed to perform the duties of their respective offices: "I, ——— ———, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ——— according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States: So help me God."

Judges prohibited from practicing law

Sec. 258. It shall not be lawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law. Any person offending against the prohibition of this section shall be deemed guilty of a high misdemeanor.

Traveling expenses, etc., of circuit justices and circuit and district judges

Sec. 259. The circuit justices, the circuit and district judges of the United States, and the judges of the district courts of the United States in Alaska, Hawaii, and Porto Rico, shall each be allowed and paid his necessary expenses of travel, and his reasonable expenses (not to exceed ten dollars per day) actually incurred for maintenance, consequent upon his attending court or transacting other official business in pursuance of law at any place other than

his official place of residence, said expenses to be paid by the marshal of the district in which such court is held or official business transacted, upon the written certificate of the justice or judge. The official place of residence of each justice and of each circuit judge while assigned to the Commerce Court shall be at Washington; and the official place of residence of each circuit and district judge, and of each judge of the district courts of the United States in Alaska, Hawaii, and Porto Rico, shall be at that place nearest his actual residence at which either a circuit court of appeals or a district court is regularly held. Every such judge shall, upon his appointment, and from time to time thereafter whenever he may change his official residence, in writing notify the Department of Justice of his official place of residence.

Salary of judges after resignation

Sec. 260. When any judge of any court of the United States appointed to hold his office during good behavior resigns his office, after having held a commission or commissions as judge of any such court or courts at least ten years continuously, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his retirement for the office that he held at the time of his resignation.

Writs of ne exeat

Sec. 261. Writs of ne exeat may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any district judge, in cases where they might be granted by the district court of which he is a judge. But no writ of ne exeat shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States.

Power to issue writs

Sec. 262. [See ante, p. 493.]

Temporary restraining orders

Sec. 263. [See ante, p. 428.]

Injunctions; in what cases judge may grant

Sec. 264. [See ante, p. 429.]

Injunctions to stay proceedings in State courts

Sec. 265. [See ante, p. 430.]

Injunctions based upon alleged unconstitutionality of State statutes; when and by whom may be granted

Sec. 266. (See ante, p. 432.]

When suits in equity may be maintained

Sec. 267. [See ante, p. 418.]

Power to administer oaths and punish contempts

Sec. 268. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

New trials

Sec. 269. [See ante, p. 411.]

Power to hold to security for the peace and good behavior

Sec. 270. The judges of the Supreme Court and of the circuit courts of appeals and district courts, United States commissioners, and the judges and other magistrates of the several States, who are or may be authorized by law to make arrests for offenses against the United States, shall have the like authority to hold to security of the peace and for good behavior, in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective States, in cases cognizable before them.

Power to enforce awards of foreign consuls, etc., in certain cases

Sec. 271. The district courts and the United States commissioners shall have power to carry into effect, according to the true intent and meaning thereof, the award or arbitration or decree of any consul, vice consul, or commercial agent of any foreign nation, made or rendered by virtue of authority conferred on him as such consul, vice consul, or commercial agent, to sit as judge or arbitrator in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to his charge, application for the exercise of such power being first made to such court or commissioner, by petition of such consul, vice consul, or commercial agent. And said courts and commissioners may issue all proper remedial process, mesne and final, to carry into full effect such award, arbitration, or decree, and to enforce obedience thereto by imprisonment in the jail or other place of confinement in the district in which the United States may lawfully imprison any person arrested under the authority of the United States, until such award, arbitration, or decree is complied with, or the parties are otherwise discharged therefrom, by the consent in writing of such consul, vice consul, or commercial agent, or his successor in office, or by the authority of the foreign government appointing such consul, vice consul, or com-

mercial agent: Provided, however, That the expenses of the said imprisonment and maintenance of the prisoners, and the cost of the proceedings, shall be borne by such foreign government, or by its consul, vice consul, or commercial agent requiring such imprisonment. The marshals of the United States shall serve all such process, and do all other acts necessary and proper to carry into effect the premises, under the authority of the said courts and commissioners.

Parties may manage their causes personally or by counsel

Sec. 272. In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein.

Certain officers forbidden to act as attorneys

Sec. 273. No clerk, or assistant or deputy clerk, of any Territorial, district, or circuit court of appeals, or of the Court of Claims, or of the Supreme Court of the United States, or marshal or deputy marshal of the United States within the district for which he is appointed, shall act as a solicitor, proctor, attorney, or counsel in any cause depending in any of said courts, or in any district for which he is acting as such officer.

Penalty for violating preceding section

Sec. 274. Whoever shall violate the provisions of the preceding section shall be stricken from the roll of attorneys by the court upon complaint, upon which the respondent shall have due notice and be heard in his defense; and in the case of a marshal or deputy marshal so acting, he shall be recommended by the court for dismissal from office.

CHAPTER TWELVE

JURIES

Sec.
275. Qualifications and exemptions of jurors.
276. Jurors, how drawn.
277. Jurors, how to be apportioned in the district.
278. Race or color not to exclude.
279. Venire, how issued and served.
280. Talesmen for petit juries.
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282. Number of grand jurors.
283. Foreman of grand jury.
284. Grand juries, when summoned.
285. Discharge of grand juries.
286. Jurors not to serve more than once a year.
287. Challenges.
288. Persons disqualified for service on jury in prosecutions for polygamy, etc.

Qualifications and exemptions of jurors

Sec. 275. Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject

to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned.

Jurors, how drawn

Sec. 276. All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations until the whole number required shall be placed therein.

Jurors, how to be apportioned in the district

Sec. 277. Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service.

Race or color not to exclude

Sec. 278. No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States on account of race, color, or previous condition of servitude.

Venire, how issued and served

Sec. 279. Writs of venire facias, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in person, or by his deputy; or, in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as may be specially appointed for that purpose by the court, who shall administer to him an oath that he will truly and impartially serve and return the writ. Any person named in such writ who resides elsewhere than at the place at which the court is held, shall be served by the marshal mailing a copy thereof to such person commanding him to attend as a juror at a time and place designated therein, which copy shall be registered and deposited in the post office addressed to such person at his usual post office address. And the receipt of the person so ad-

dressed for such registered copy shall be regarded as personal service of such writ upon such person, and no mileage shall be allowed for the service of such person. The postage and registry fee shall be paid by the marshal and allowed him in the settlement of his accounts.

Talesmen for petit juries

Sec. 280. When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section.

Special juries

Sec. 281. When special juries are ordered in any district court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several States.

Number of grand jurors

Sec. 282. Every grand jury impaneled before any district court shall consist of not less than sixteen nor more than twenty-three persons. If of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose.

Foreman of grand jury

Sec. 283. From the persons summoned and accepted as grand jurors, the court shall appoint the foreman, who shall have power to administer oaths and affirmations to witnesses appearing before the grand jury.

Grand juries, when summoned

Sec. 284. No grand jury shall be summoned to attend any district court unless the judge thereof, in his own discretion or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor. If the United States attorney for any district which has a city or borough containing at least three hundred thousand inhabitants shall certify in writing to the district judge, or the senior district judge of the district, that the exigencies of the public service require it, the judge may, in his discre-

tion, also order a venire to issue for a second grand jury. And said court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. But nothing herein shall operate to extend beyond the time permitted by law the imprisonment before indictment found of a person accused of a crime or offense, or the time during which a person so accused may be held under recognizance before indictment found.

Discharge of grand juries

Sec. 285. The district courts, the district courts of the Territories, and the Supreme Court of the District of Columbia may discharge their grand juries whenever they deem a continuance of the sessions of such juries unnecessary.

Jurors not to serve more than once a year

Sec. 286. No person shall serve as a petit juror in any district court more than one term in a year; and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within one year prior to the time of such challenge.

Challenges

Sec. 287. When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to six peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers.

Persons disqualified for service on jury in prosecutions for polygamy, etc.

Sec. 288. In any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juryman or talesman—

First, that he is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offense punishable either by sections one or three of an Act entitled "An Act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes," approved March twenty-second, eighteen hundred and eighty-two, or by section fifty-three hundred and fifty-two of the Revised Statutes of the United

States, or the Act of July first, eighteen hundred and sixty-two, entitled "An Act to punish and prevent the practice of polygamy in the Territories of the United States and other places, and disapproving and annulling certain Acts of the legislative assembly of the territory of Utah"; or

Second, that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman.

Any person appearing or offered as a juror or talesman, and challenged on either of the foregoing grounds, may be questioned on his oath as to the existence of any such cause of challenge; and other evidence may be introduced bearing upon the question raised by such challenge; and this question shall be tried by the court.

But as to the first ground of challenge before mentioned, the person challenged shall not be bound to answer if he shall say upon his oath that he declines on the ground that his answer may tend to criminate himself; and if he shall answer as to said first ground, his answer shall not be given in evidence in any criminal prosecution against him for any offense above named; but if he declines to answer on any ground, he shall be rejected as incompetent.

CHAPTER THIRTEEN

GENERAL PROVISIONS

Sec.
289. Circuit courts abolished; records of to be transferred to district courts.
290. Suits pending in circuit courts to be disposed of in district courts.
291. Powers and duties of circuit courts imposed upon district courts.
292. References to laws revised in this act deemed to refer to sections of act.
293. Sections 1 to 5, Revised Statutes, to govern construction of this act.
294. Laws revised in this act to be construed as continuations of existing laws.
295. Inference of legislative construction not to be drawn by reason of arrangement of sections.
296. Act may be designated as "The Judicial Code."

Circuit courts abolished; records of to be transferred to district courts

Sec. 289. The circuit courts of the United States, upon the taking effect of this Act, shall be, and hereby are, abolished; and thereupon, on said date, the clerks of said courts shall deliver to the clerks of the district courts of the United States for their respective districts all the journals, dockets, books, files, records, and other books and papers of or belonging to or in any manner connected with said circuit courts; and shall also on said date deliver to the clerks of said district courts all moneys, from whatever source re-

ceived, then remaining in their hands or under their control as clerks of said circuit courts, or received by them by virtue of their said offices. The journals, dockets, books, files, records, and other books and papers so delivered to the clerks of the several district courts shall be and remain a part of the official records of said district courts, and copies thereof, when certified under the hand and seal of the clerk of the district court, shall be received as evidence equally with the originals thereof; and the clerks of the several district courts shall have the same authority to exercise all the powers and to perform all the duties with respect thereto as the clerks of the several circuit courts had prior to the taking effect of this Act.

Suits pending in circuit courts to be disposed of in district courts

Sec. 290. All suits and proceedings pending in said circuit courts on the date of the taking effect of this Act, whether originally brought therein or certified thereto from the district courts, shall thereupon and thereafter be proceeded with and disposed of in the district courts in the same manner and with the same effect as if originally begun therein, the record thereof being entered in the records of the circuit courts so transferred as above provided.

Powers and duties of circuit courts imposed upon district courts

Sec. 291. [See ante, pp. 197, 401, 579.]

References to laws revised in this act deemed to refer to sections of act

Sec. 292. Wherever, in any law not contained within this Act, a reference is made to any law revised or embraced herein, such reference, upon the taking effect hereof, shall be construed to refer to the section of this Act into which has been carried or revised the provision of law to which reference is so made.

Sections 1 to 5, Revised Statutes, to govern construction of this act

Sec. 293. The provisions of sections one to five, both inclusive, of the Revised Statutes, shall apply to and govern the construction of the provisions of this Act. The words "this title," wherever they occur herein, shall be construed to mean this Act.

Laws revised in this act to be construed as continuations of existing laws

Sec. 294. The provisions of this Act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest.

Inference of legislative construction not to be drawn by reason of arrangement of sections

Sec. 295. The arrangement and classification of the several sections of this Act have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the chapter under which any particular section is placed.

Act may be designated as "The Judicial Code"

Sec. 296. This Act may be designated and cited as "The Judicial Code."

CHAPTER FOURTEEN

REPEALING PROVISIONS

Sec.
297. Sections, acts, and parts of acts repealed.
298. Repeal not to affect tenure of office, or salary, or compensation of incumbents, etc.
299. Accrued rights, etc., not affected.
300. Offenses committed, and penalties, forfeitures, and liabilities incurred, how to be prosecuted and enforced.
301. Date this act shall be effective.

Sections, acts, and parts of acts repealed

Sec. 297. The following sections of the Revised Statutes and Acts and parts of Acts are hereby repealed:

Sections five hundred and thirty to five hundred and sixty, both inclusive; sections five hundred and sixty-two to five hundred and sixty-four, both inclusive; sections five hundred and sixty-seven to six hundred and twenty-seven, both inclusive; sections six hundred and twenty-nine to six hundred and forty-seven, both inclusive; sections six hundred and fifty to six hundred and ninety-seven, both inclusive; section six hundred and ninety-nine; sections seven hundred and two to seven hundred and fourteen, both inclusive; sections seven hundred and sixteen to seven hundred and twenty, both inclusive; section seven hundred and twenty-three; sections seven hundred and twenty-five to seven hundred and forty-nine, both inclusive; sections eight hundred to eight hundred and twenty-two, both inclusive; sections ten hundred and forty-nine to ten hundred and eighty-eight, both inclusive; sections ten hundred and ninety-one to ten hundred and ninety-three, both inclusive, of the Revised Statutes.

"An Act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," approved March third, eighteen hundred and seventy-five.

Section five of an Act entitled "An Act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes," approved March twenty-second, eighteen hundred and eighty-two; but sections six, seven, and eight of said Act, and sections one, two, and twenty-six of an Act entitled "An Act to amend an Act entitled 'An Act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes,' approved March twenty-second, eighteen hundred and eighty-two," approved March third, eighteen hundred and eighty-seven, are hereby continued in force.

"An Act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the Government," approved March third, eighteen hundred and eighty-three.

"An Act regulating appeals from the supreme court of the District of Columbia and the supreme courts of the several Territories," approved March third, eighteen hundred and eighty-five.

"An Act to provide for the bringing of suits against the Government of the United States," approved March third, eighteen hundred and eighty-seven, except sections four, five, six, seven, and ten thereof.

Sections one, two, three, four, six, and seven of an Act entitled "An Act to correct the enrollment of an Act approved March third, eighteen hundred and eighty-seven, entitled 'An Act to amend sections one, two, three, and ten of an Act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes,' approved March third, eighteen hundred and seventy-five," approved August thirteenth, eighteen hundred and eighty-eight.

"An Act to withdraw from the Supreme Court jurisdiction of criminal cases not capital and confer the same on the circuit courts of appeals," approved January twentieth, eighteen hundred and ninety-seven.

"An Act to amend sections one and two of the Act of March third, eighteen hundred and eighty-seven, Twenty-fourth Statutes at Large, chapter three hundred and fifty-nine," approved June twenty-seventh, eighteen hundred and ninety-eight.

"An Act to amend the seventh section of the Act entitled 'An Act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' approved March third, eighteen hundred and ninety-one, and the several Acts amendatory thereto," approved April fourteenth, nineteen hundred and six.

All Acts and parts of Acts authorizing the appointment of United States circuit or district judges, or creating or changing judicial circuits, or judicial districts or divisions thereof, or fixing or chang-

ing the times or places of holding court therein, enacted prior to February first, nineteen hundred and eleven.

Sections one, two, three, four, five, the first paragraph of section six, and section seventeen of an Act entitled "An Act to create a commerce court, and to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes," approved June eighteenth, nineteen hundred and ten.

Also all other Acts and parts of Acts, in so far as they are embraced within and superseded by this Act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this Act had not been passed.

Repeal not to affect tenure of office, or salary, or compensation of incumbents, etc.

Sec. 298. The repeal of existing laws providing for the appointment of judges and other officers mentioned in this Act, or affecting the organization of the courts, shall not be construed to affect the tenure of office of the incumbents (except the office be abolished), but they shall continue to hold their respective offices during the terms for which appointed, unless removed as provided by law; nor (except the office be abolished) shall such repeal affect the salary or fees or compensation of any officer or person holding office or position by virtue of any law.

Accrued rights, etc., not affected

Sec. 299. The repeal of existing laws, or the amendments thereof, embraced in this Act, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding, including those pending on writ of error, appeal, certificate, or writ of certiorari, in any appellate court referred to or included within, the provisions of this Act, pending at the time of the taking effect of this Act, but all such suits and proceedings, and suits and proceedings for causes arising or acts done prior to such date, may be commenced and prosecuted within the same time, and with the same effect, as if said repeal or amendments had not been made.

Offenses committed, and penalties, forfeitures, and liabilities incurred, how to be prosecuted and enforced

Sec. 300. All offenses committed, and all penalties, forfeitures, or liabilities incurred prior to the taking effect hereof, under any law embraced in, amended, or repealed by this Act, may be prosecuted and punished, or sued for and recovered, in the district courts, in the same manner and with the same effect as if this Act had not been passed.

Date this act shall be effective

Sec. 301. This Act shall take effect and be in force on and after January first, nineteen hundred and twelve.

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THE COMMERCE COURT

THE PORTION OF THE DEFICIENCY APPROPRIATION BILL OF OCTOBER 22, 1913, ABOLISHING IT

The Commerce Court, created and established by the Act entitled "An Act to create a Commerce Court and to amend the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes," approved June eighteenth, nineteen hundred and ten, is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment under the terms of said Act, but such judges shall continue to act under assignment, as in the said Act provided, as judges of the district courts and circuit courts of appeals; and in the event of and on the death, resignation, or removal from office of any of such judges, his office is hereby abolished and no successor to him shall be appointed.

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and processes of the district courts may in these cases run, be

served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: Provided, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days rrom the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry

of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the attorney general of the State. All cases pending in the Commerce Court at the date of the passage of this Act shall be deemed pending in and be transferred forthwith to said district courts except cases which may previously have been submitted to that court for final decree and the latter to be transferred to the district courts if not decided by the Commerce Court before December first, nineteen hundred and thirteen, and all cases wherein injunctions or other orders or decrees, mandatory or otherwise, have been directed or entered prior to the abolition of the said court shall be transferred forthwith to said district courts, which shall have jurisdiction to proceed therewith and to enforce said injunctions, orders, or decrees. Each of said cases and all the records, papers, and proceedings shall be transferred to the district court wherein it might have been filed at the time it was filed in the Commerce Court if this Act had then been in effect; and if it might have been filed in any one of two or more district courts it shall be transferred to that one of said district courts which may be designated by the petitioner or petitioners in said case, or, upon failure of said petitioners to act in the premises within thirty days after the passage of this Act, to such one of said district courts as may be designated by the judges of the Commerce Court. The judges of the Commerce Court shall have authority, and are hereby directed, to make any and all orders and to take any other action necessary to transfer as aforesaid the cases and all the records, papers, and proceedings then pending in the Commerce Court to said district courts. All administrative books, dockets, files, and all papers of the Commerce Court not transferred as part of the record of any particular case shall be lodged in the Department of Justice. All furniture, carpets, and other property of the Commerce Court is turned over to the Department of Justice and the Attorney General is authorized to supply such portion thereof as in his judgment may be proper and necessary to the United States Board of Mediation and Conciliation.

Any case hereafter remanded from the Supreme Court which, but for the passage of this Act, would have been remanded to the Commerce Court, shall be remanded to a district court, designated by the Supreme Court, wherein it might have been instituted at the time it was instituted in the Commerce Court if this Act had then been in effect, and thereafter such district court shall take all necessary and proper proceedings in such case in accordance with law and such mandate, order, or decree therein as may be made by said Supreme Court.

All laws or parts of laws inconsistent with the foregoing provisions relating to the Commerce Court, are repealed.

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 (1) The Act of March 3, 1851, as Amended.
 (2) The Act of June 26, 1884.
4. Section 941, Rev. St., as Amended, Regulating Bonding of Vessels.
5. Statutes Regulating Evidence in the Federal Courts.
6. Suits in Forma Pauperis.
7. The Admiralty Rules of Practice.

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1. Introduction—What it Comprehends.
2. The District Court—Its Criminal Jurisdiction and Practice.
3. Same—Continued.
4. The District Court—Criminal Jurisdiction—Miscellaneous Jurisdiction.
5. The District Court—Bankruptcy.
6–8. Same—Continued.
9. The District Court—Miscellaneous Jurisdiction.
10. The Circuit Court—Original Jurisdiction.
11–12. Same—Continued.
13. The Circuit Court—Jurisdiction by Removal.
14–15. Same—Continued.
16. The Circuit Court—Jurisdiction by Removal—Original Jurisdiction of the Supreme Court—Other Minor Courts of Original Jurisdiction.
17. Procedure in the Ordinary Federal Courts of Original Jurisdiction—Courts of Law.
18. Procedure in the Ordinary Federal Courts of Original Jurisdiction—Courts of Equity.
19. Same—Continued.
20. Appellate Jurisdiction—The Circuit Court of Appeals.
21. Appellate Jurisdiction—The Supreme Court.
22. Procedure on Error and Appeal.

The U. S. Supreme Court Rules and the Rules of Practice for the Courts of Equity of the United States are given in an appendix.

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2. Quasi Corporations—Liabilities, Elements, Counties, Property, etc.
3. Same—Continued.
4. Same—Continued.

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5. Municipal Corporations.
6. Their Creation—How—By What Bodies—Subject to What Restrictions, etc.
7. Their Alteration and Dissolution.
8. The Charter.
9. Legislative Control.
10. Proceedings and Ordinances.
11. Officers, Agents, and Employés.
12. Contracts.
13. Improvements.
14. Police Powers and Regulations.
15. Streets, Sewers, Parks, and Public Buildings.
16. Torts.
17. Debts, Funds, Expenses, and Administration.
18. Taxation.
19. Actions.

Part 3.—QUASI PUBLIC CORPORATIONS.

20. Quasi Public Corporations.
21. Railroads.
22. Electric Companies.
23. Water and Gas Companies.
24. Other Quasi Public Corporations.

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Chap.

1. General Nature of Torts.
2. Variations in the Normal Right to Sue.
3. Liability for Torts Committed by or with Others.
4. Discharge and Limitation of Liability for Torts.
5. Remedies.

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8. Wrongs Affecting Reputation.
9. Malicious Wrongs.
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3. Acceptance of Bills of Exchange.
4. Indorsement.
5. Of the Nature of the Liabilities of the Parties.
6. Transfer.
7. Defenses as against Purchaser for Value without Notice.
8. The Purchaser for Value without Notice.
9. Of Presentment and Notice of Dishonor.
10. Checks.

Appendix.

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2. Forms of Action.
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7. Materialty in Pleading.
8. Singleness or Unity in Pleading.
9. Certainty in Pleading.
10. Consistency and Simplicity in Pleading.
11. Directness and Brevity in Pleading.
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2. Government and its Functions.
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6. The Written Law.
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9. Property.
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16. Title to Real Property.
17. Personal Property.
18. Succession After Death.
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20. Special Contracts.
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3. Same (continued)—Ratification.
4. What Acts Can be Done by Agent—Illegality—Capacity of Parties—Joint Principals and Agents.
5. Delegation by Agent—Subagents.
6. Termination of the Relation.
7. Construction of Authority.

Part 2.—RIGHTS AND LIABILITIES BETWEEN PRINCIPAL AND THIRD PERSON.

8. Liability of Principal to Third Person—Contract.
9. Same (continued).
10. Admissions by Agent—Notice to Agent.
11. Liability of Principal to Third Person—Torts and Crimes.
12. Liability of Third Person to Principal.

Part 3.—RIGHTS AND LIABILITIES BETWEEN AGENT AND THIRD PERSON.

13. Liability of Agent to Third Person (including parties to contracts).
14. Liability of Third Person to Agent.

Part 4.—RIGHTS AND LIABILITIES BETWEEN PRINCIPAL AND AGENT.

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16. Duties of Principal to Agent.

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6. Collections.
7. Loans and Discounts.
8. Bank Notes.
9. Banking Corporations.
10. Representation of Bank by Officers.
11. Insolvency.
12. National Banks.
13. Savings Banks.
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With Key-Number Annotations

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6. Antenuptial and Postnuptial Settlements.
7. Separation and Divorce.

Part 2.—PARENT AND CHILD.

8. Legitimacy, Illegitimacy, and Adoption.
9. Duties and Liabilities of Parents.
10. Rights of Parents and of Children.

Part 3.—GUARDIAN AND WARD.

11. Guardians Defined—Selection and Appointment.
12. Rights, Duties, and Liabilities of Guardians.
13. Termination of Guardianship—Enforcing Guardian's Liability.

Part 4.—INFANTS, PERSONS NON COMPOTES MENTIS, AND ALIENS.

14. Infants.
15. Persons Non Compotes Mentis and Aliens.

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4. Effect of the Contract in Passing the Property—Sale of Goods not Specific.
5. Fraud, and Retention of Possession.
6. Illegality.
7. Conditions and Warranties.
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10. Nature and Commencement.
11. Area and General Effect of Belligerent Operations.
12. Rights and Obligations During War.
13. Persons During War.
14. Property on Land.
15. Property on Water.
16. Maritime Capture.
17. Rules of War.
18. Military Occupation and Government.
19. Prisoners, Disabled and Shipwrecked.
20. Non-Hostile Relations between Belligerents.
21. Termination of War.
22. Nature of Neutrality.
23. Visit and Search.
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